# SUPREME COURT OF THE UNITED STATES.

## No. 509.

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THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

OLGA DE MALUTA FRALOFF.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Olga de Maluta Fraloff, plaintiff, and the New York Central and Hudson River Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The New York Central and Hudson River Railroad Company, as is said and as appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 20th day of May, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

[SEAL.] KENNETH G. WHITE,
*Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.*

2 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, John I. Davenport, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, do hereby certify, *that* by virtue of the foregoing writ of error and in obedience thereto, that the following pages, numbered from one to 141, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Olga de Maluta Fraloff, defendant in error, and the New York Central and Hudson River Railroad Company, plaintiff in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 21st day of August, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the said United States the one hundred and first.

[SEAL.] JOHN I. DAVENPORT,
*Clerk.*

(Indorsed:) U. S. Supreme Court. The New York Central & Hudson River Railroad Company, plaintiff in error, against Olga de Maluta Fraloff, defendant in error. Writ of error. Elliott F. Shepard, attorney for plaintiff in error, 90 Broadway, New York. Allowed May 20th, 1875. Sam'l Blatchford. Filed May 21, 1875.

REC. 509—1

Due service of a copy of the within writ of error is hereby admitted this 21st day of May, 1875.

PLATT & GERARD,
*Pl'ff's Att'ys.*

3 Circuit court of the United States for the southern district of New York.

Pleas before the judge of the circuit court of the United States of America for the southern district of New York, in the southern circuit, at the city of New York, of the January term, to wit, of the 19th day of January, in the year of our Lord one thousand eight hundred and seventy.

Witness the Hon. William J. Wallace, judge of the said court.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 19th day of January, 1870, in the January term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the court-room, No. 41 Chambers street, in the city of
4 New York, in the said district, before the judge of the said court came Olga de Maluta Fraloff, by G. R. & T. D. Pelton, esq's, her attorneys, and brought then and there into the said court, before the judges thereof, her certain declaration against the New York Central and Hudson River Railroad Company, being in custody, &c., of a plea of trespass on the case, which said declaration follows in these words, that is to say:

In the circuit court of the United States for the second circuit and southern district of New York. Of January term, to wit, the 19th day of January, in the year of our Lord one thousand eight hundred and seventy.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The New York Central and Hudson River Railroad Company was duly summoned to answer Olga de Maluta Fraloff, a subject of
5 *of* the Czar of Russia, and an alien, of a plea of trespass on the case; and now the said The New York Central and Hudson River Railroad Company, defendant, having come into court, the said Olga de Maluta Fraloff, plaintiff, being also present in court by G. R. & T. D. Pelton, her attorneys, complains of and against the said def endant for this:

FIRST COUNT.—Whereas the said defendant now is, and at the several dates and times hereinafter stated was, a corporation duly authorized and organized under and in pursuance and by virtue of the laws of the State of New York, by the corporate name of The NewYork Central and Hudson River Railroad Company.

And whereas said defendant in pursuance of said laws, now is, and at said several dates and times was, and ever since hath con-
6 tinued to be, a common carrier of passengers and their baggage, and of divers goods and chattels for hire, profit, and reward, to wit, from the city of New York in the southern district of New York, through and to the several cities and villages of Albany, Suspension Bridge, Niagara Falls, and Buffalo, in the State of New York.

And whereas the said plaintiff was then, and hath ever since con-

tinued to be, and now is, an alien to the Government of the United States, and a subject of the Czar, and a citizen of the Empire of Russia.

And whereas the said plaintiff at the time of the delivery to the defendant, hereinafter specified, was the true and lawful owner of a certain trunk which contained her reasonable and ordinary wearing apparel, and among other things, as a part of her said wearing apparel, 267 yards of laces of great value, to wit, of the value of seventy five
7 thousand dollars, of which wearing apparel and laces she was also the true and lawful owner, and was also as a traveller journeying through the United States and the State of New York; said trunk and wearing apparel and laces then consisting and being in fact her reasonable and ordinary baggage for her said journey.

And whereas the said plaintiff, whilst the said defendant was such common carrier as aforesaid, to wit, on the 4th day of November, A. D. 1869, to wit, at the said city of Albany, where the plaintiff then was and had with her the trunk containing the property aforesaid, intending to travel over the said route of said defendant from Albany to Niagara Falls, did deliver the said trunk, and its contents securely and safely locked and fastened up within the same, unto said defendant, in the ordinary course of its said business, to be safely and securely carried and
8 conveyed, together with the said plaintiff as a passenger, to said Niagara Falls, and there to be securely and safely, and within a reasonable time, delivered unto and for said plaintiff for a certain reasonable reward, to wit, the usual charges and rates of fare of said defendant for transporting and carrying passengers and their baggage from said Albany to said Niagara Falls, which charges and rates of fare the said plaintiff then and there paid to said defendant in cash, and which trunk and said contents the said defendant then and there did receive from the said plaintiff as her reasonable and proper baggage; yet the said defendant, not regarding its duty as such common carrier, but contriving, and fraudulently intending, craftily intending subtily to deceive, defraud, and injure the plaintiff in this behalf, did not nor would safely or securely carry or convey the said
9 trunk and its contents aforesaid from Albany to said Niagara Falls, nor there at said Niagara Falls safely or securely deliver the same to the plaintiff within a reasonable time, although such time has more than elapsed, nor has it ever delivered the same, but to the contrary thereof the said defendant, being such carrier as aforesaid, so carelessly and negligently behaved and conducted itself in the premises, that by and through the carelessness, negligence, and default of said defendant in the premises a part of the contents of said trunk, to wit, the said laces, of the value aforesaid, became and were wholly lost to the plaintiff.

SECOND COUNT.—And for this: Whereas the said defendant, at the times hereinafter stated, was a corporation as stated in the first count, and the plaintiff was an alien, and the defendant was a common carrier, as stated in said first count, from, to, and through the places
10 therein in that behalf alleged.

And whereas the plaintiff was the owner of a certain other trunk and certain other contents, to wit, goods and chattels of a like quantity, quality, description, and value as those in said first count alleged, which property she had at said city of Albany.

And whereas the said plaintiff was then and there intending to travel over the route of the defendant with her said trunk and said contents, which constitutes and was her reasonable baggage.

And whereas the said plaintiff, at the time and place in the first count

alleged, did deliver the said trunk and its contents to the defendant to be safely and securely carried and conveyed, together with said plaintiff as a passenger, from said Albany to said Niagara Falls, there within a reasonable time to be securely and safely delivered to and for the
11 plaintiff for a certain reasonable reward which was sufficient and appropriate for that service, to wit, the usual charges and rates of fare for carrying passengers and their baggage from said Albany to said Niagara Falls, which charges and rates of fare the said plaintiff then and there paid to said defendant.

And whereas the said defendant, at the time and place aforesaid, to wit, on the 4th day of November, A. D. 1869, to wit, at said Albany, did receive said plaintiff as a passenger, and her said trunk and its contents as her reasonable baggage, to be carried and delivered as aforesaid, yet the said defendant, not regarding is duty in the premises, but through and by means of its careless and negligent omissions to perform its duty as a common carrier, so negligently and carelessly behaved and acted in the premises that it did not nor would within a reasonable time, nor did nor would it ever, although much more than a rea-
12 sonable time has elapsed, and although the said plaintiff was at said Niagara Falls to receive said trunk, safely and surely carry and deliver said trunk and its said contents at said Niagara Falls, but to the contrary thereof, through and by means of its said negligence and carelessness, it wholly lost a part of the contents of said trunk, to wit, the laces which it contained, of the value aforesaid; and the same have ever since been, and now are, wholly lost to this plaintiff.

THIRD COUNT.—And for this: Whereas the said defendant was a corporation, authorized, organized, and by the name in the first count alleged, and at the time of making the promise hereinafter set forth, and ever since hath been and now is such corporation, for the purposes and engaged in the business in said count alleged.

And whereas the said defendant, as such corporation, and being
13 such common carrier, was the owner of a certain railway with and upon which, in cars and railway coaches, it carried on and conducted the business of a railway carrier of passengers and their baggage and of general merchandize as freight, for hire, profit, and reward, which said railway extended into and from the city of New York, in the southern district of New York, to and through the cities and villages of Albany, Suspension Bridge, Niagara Falls, and Buffalo, and elsewhere, over and upon which route it carried on and conducted its said business.

And whereas the plaintiff was, at the several times in this count mentioned or otherwise referred to, an alien to the Government of the United States, and not a subject or citizen of said United States, but was a subject of the Czar of Russia and a citizen of the empire of Russia, the said Czar of Russia and the empire of Russia then and now
14 being on friendly terms and at peace with the United States.

And whereas the said plaintiff, before and at the time of the delivery to said defendant of the property hereinafter mentioned, was the owner of a certain other trunk and certain other wearing apparel, among which was certain laces of great value, to wit, 267 yards of said laces, of the value of seventy-five thousand dollars, which said wearing apparel, including said laces, was and constituted her reasonable baggage.

And whereas the plaintiff was an unmarried person, and was travelling through the said United States and said State of New York, and on the 4th day of November, A. D. 1869, was at said city Albany,
15 and had with her the said trunk which then and there contained

said wearing apparel, including said laces, and which trunk was securely locked and fastened.

And whereas said plaintiff was then and there intending to travel from said Albany to said Niagara Falls over the defendant's said route; and the defendant, being such carrier as aforesaid, the said plaintiff heretofore, to wit, on said 4th day of November, 1869, to wit, at said Albany, at the special instance and request of said defendant, caused to be delivered to the defendant, being such carrier as aforesaid, the said trunk, fastened and locked as aforesaid, containing the said wearing apparel, including said laces, to be taken care of and safely and securely carried and conveyed by the defendant, as such carrier, together with the said plaintiff as a passenger, upon said railway from said Albany to said Niagara Falls, and there at said Niagara Falls to be securely and safely delivered to and for said plaintiff within a reasonable time; and in consideration thereof, and of a certain reward to the said defendant in that behalf, the said defendant, being such carrier as aforsaid, then and there, to wit, on the said 4th day of November, 1869, at said Albany, undertook and faithfully promised the said plaintiff to take care of the said trunk and its said contents, and safely and securely to carry and convey the same upon its said railway, together with the plaintiff as a passenger, from said Albany to said Niagara Falls, and there at said Niagara Falls safely and securely to deliver to and for said plaintiff within a reasonable time, and although the said defendant, as such carrier as aforesaid, then and there had and received said trunk and its said contents, locked and fastened as aforesaid and for the purpose aforesaid, yet the defendant, not regarding its duty as a common carrier nor his undertaking and promise so made as aforesaid, but contriving and fradulently intending, craftily, and subtily to deceive and injure the plaintiff in this behalf, hath not taken care of said trunk and its said contents or its said contents, or safely or securely carried or conveyed the same from said Albany to said Niagara Falls, nor hath there, at said Niagara Falls, within a reasonable time, (although more than a reasonable time hath long since elapsed,) nor hath at any time afterwards, delivered the same to or for the plaintiff, but to the contrary thereof, the defendant, being such carrier as aforesaid, so carelessly and negligently behaved and conducted itself with respect to said trunk and its said contents, that by and through the carelessness, negligence, and improper conduct of itself and its agents and servants in this behalf, the said laces, being of the value aforesaid, on or about the said 4th day of November, 1869, at a place unknown to the plaintiff, but while in the custody of the defendant, were wholly lost to the plaintiff, to wit, were forcibly abstracted from said trunk and carried away by some person or persons to the plaintiff unknown.

Wherefore the plaintiff saith that she has been injured and hath sustained damages to the amount of seventy-five thousand dollars, and she therefore brings her suit.

Olga de Maluta Fraloff puts in her place G. R. & T. D. Pelton, her attorneys, against the New York Central and Hudson River Railroad Company in a plea of trespass on the case.

And the said The New York Central and Hudson River Railroad Company, defendants in this suit, by L. T. Fairchild, their attorney, come and defend the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge in manner and form as the said Olga de Maluta Fraloff hath

above complained against it, and of this the said New York Central & Hudson River Railroad Company puts itself upon the country.

Therefore the issue above joined is ordered by the said court to be tried at the term of the said court appointed to be held at the city of New York on the 1st Monday of October, 1874.

And now, at this day, to wit, on the fifteenth day of January, 1875, being as yet of the said October term, before the said justices, at the United States court-rooms, in the said city of New York, came the said Olga de Maluta Fraloff, by Platt & Gerard, her attorneys, and
21 the said Hon. William J. Wallace, before whom the said issue was tried, has sent hither his record had before whom in these words, to wit:

Afterwards, that is to say, at which day and place last aforesaid, before the judge of the said court, came as well the above-named plaintiff as the above-named defendants, by their respective attorneys aforesaid, and the jurors of the said jury, summoned to try the said issue, being called, also came, who, to speak the truth of the matters aforesaid, being chosen, tried, and sworn, say, upon their oath, that the said defendants are guilty of the trespass above laid to their charge, in manner and form as the said plaintiff hath above complained against them, and they assess the damages of the said plaintiff, by reason of the premises, over and above her costs and charges by her about her suit in this
22 behalf expended, at ten thousand dollars, without interest.

Therefore it is considered that the said plaintiff do recover against the said defendants her said damages of ten thousand dollars, without interest, by the jurors aforesaid in form aforesaid assessed, and also seven hundred and ninety-seven $\frac{83}{100}$ dollars for her costs and charges by the court here adjudged, which said damages, costs, and charges, in the whole, amount to ten thousand seven hundred and ninety-seven dollars and eighty-three cents.

And the said defendants, in mercy, &c.

Judgment signed this eleventh day of May, 1875.

R. E. STILWELL,
*Deputy Clerk.*

(Endorsed:) U. S. circuit court, southern district of New York.
23 Olga de Maluta Fraloff ag'st The New York Central & Hudson River Railroad Co. Judgment record. Platt & Gerard, att'ys for pl'ff, 45 William st., N. Y. Filed May 11, 1875.

24 *Bill of exceptions.*

Circuit court of the United States for the southern district of New York.

OLGA DE MALUTA FRALOFF
*against*
THE NEW YORK CENTRAL AND HUDSON RIVER Railroad Company.

This is the second trial of the action.

Afterwards, to wit, at the day and place within mentioned, that is to say, at the city of New York, on the 6th day of January, one thousand eight hundred and seventy-five, before the Hon. William J. Wallace, district judge of the United States for the northern district of New

York, holding circuit for the second circuit, pursuant to the designation of the circuit judge, made in conformity to the statute, came as well the said Olga de Maluta Fraloff, plaintiff, by Platt and Gerard, esq's, her attorneys, and John McKeon, esq., and James W. Gerard, esq., her counsel, as the said The New York Central and Hudson River Railroad Company, defendants, by Elliott F. Shephard, esq., their attorney and counsel, and the jurors of the jury of whom mention is made, being called and sworn to try the said issues within joined, the said
25 plaintiff, by her said attorneys and counsel, and the said defendants, by their attorney and counsel, respectively offered and gave evidence as follows:

Counsel for the plaintiff offer to read in evidence the depositions of the plaintiff, taken de bene esse.

Counsel for the defendants objects to the said depositions and to the introduction of the testimony therein contained, on the following grounds:

1. That it appears upon these depositions themselves that the person who w s sworn was "Olga de Maluta Fraloff," and the depositions are signed "Barbe de Fraloff," so that there is no identity as between the affiant and the subscriber of said depositions.

2. That it appears by the declaration that the plaintiff in this action is a single woman, and in her depositions the affiant swears she is married and has been for a number of years, and has a husband living, thus showing that the affiant is not the plaintiff, although recited to be in the deposition.

3. That the following facts do not appear in said depositions
26 nor in the magistrate's certificate therein:

(*a.*) That the so-called interpreter was cautioned according to law.

(*b.*) Or that the witness could not depose in the English language, with which, by said depositions, it appears she was acquainted so far that she corrected them herself.

(*c.*) Or that the intervention of a third unmarried party as interpreter was necessary.

(*d.*) Or the name of the interpreter, whether man, woman, or child; or that this undisclosed person was cautioned and examined as to his knowledge of the two languages, and his ability to translate each of them into the other respectively, or what he was sworn to do.

4. The law strictly requires that every person sworn before a commissioner shall be cautioned, and in the matter of cautioning the interpreter he is not only to be cautioned by the magistrate that he should make a true interpretation from the English language, in which the
27 questions are asked, into the foreign language in which the answers of the witness are made, but also that he should interpret those answers correctly from the foreign language into the English.

5. That it appears by the depositions that six exhibits of lace were introduced in evidence before the commissioners which should have been annexed to or returned and filed with the depositions, but are missing; have never been annexed, returned, or filed, and no attempt has been made to do either, and the depositions are mutilated and do not contain the exhibits to which they refer, and upon which the testimony is based; and these exhibits of lace were at the time knowingly and intentionally carried away by the witness in the presence and to the knowledge of the plaintiff's counsel, and without objection on their part, as appears in said depositions.

6. Generally, that they are not depositions.

7. That defendant had never received the notice of the filing or return of the depositions, as required by the rule.

28 8. That on the former trial two years ago the plaintiff had notice of these objections to the depositions.

9. Generally, that the evidence therein contained is incompetent, improper, and immaterial.

The court thereupon overruled the motion, stating among other grounds that the objections should have been made by a motion to suppress before trial, and the several objections above set forth, and counsel for the defendants then and there excepted severally to each of such rulings by the court.

Counsel for the plaintiff then read in evidence from the first deposition the direct examination of Olga de Maluta Fraloff, or Barbe de Fraloff, whichever it may be, taken de bene esse before an U. S. commissioner, as follows:

UNITED STATES OF AMERICA,
*Southern District of New York,*
*City, County, and State of New York, ss:*

Be it remembered that on this eighteenth day of February, in the year of our Lord one thousand eight hundred and seventy, I, Edward L. Owen, a commissioner duly appointed by the circuit court of

29 the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 21st, 1789, did call and cause to be and personally appear before me, &c.

And thereupon the said Olga de Maluta Fraloff, having been by me first cautioned and sworn, through a sworn interpreter, to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Olga de Maluta Fraloff, through the sworn interpreter, and she did thereupon depose, testify, and say, &c.

The testimony in this deposition tended to show that the affiant was 33 years of age, born in Russia; that the affiant came to this

30 country for the benefit of her health, and also for the pleasure of seeing America, she having traveled through Europe, Asia, and Africa; that she brought six trunks with her to this country, containing various elegant dresses and rich wearing apparel, and also valuable and rare laces to wear on and attach to her different dresses; that she had been spending some eighteen months in London and Paris just before coming to this country; that the laces which she brought with her she was in the habit of wearing to go to a theatre, dinner, or a visit, and that she had been accustomed to use them all her life, and were specially designed by her for use at ball and court receptions.

That she arrived in New York per steamship Westphalia, from Havre, in September, 1869, attended by Count Ernest von Webber, a relative of hers, bringing with her six trunks, besides bags, &c.; that she was a chronic invalid when she started for and during her stay in this country; that she went with Webber to the Albemarle Hotel, in New York City,

and thence after a few weeks to the boarding-house of M'r's Henrietta Horn, No. 229 West 23d street.

That on November 2, 1869, they started on a journey, and went
31 first to Albany and stopped at the Delevan House; that her luggage on this trip consisted of two trunks, a satchel of jewelry, a cage of birds, a hat-box, and three or four hand-bags; that she left four trunks in New York, containing, among other articles, laces of the value of $20,000, as laid by herself; that her large trunk (in which she stated her missing laces had been packed) was not taken to her room at the Delevan House, Albany, but left on the baggage floor of the main hall of the hotel; that Webber went to this trunk to get a morning dress and shawl for her, and also to put them back, and had the key.

That after staying two nights and a day and a half she started, on Nov. 4th, 1869, from Albany with Webber, and having the same above-mentioned baggage, for Niagara Falls by defendant's railroad; that on arriving at Niagara Falls her large trunk was found injured, the locks broken, the contents of the trunk disturbed, and the laces missing which are sued for.

That she was the wife of Michel Maluta Freloff, a colonel in the
32 dragoon cavalry of the Grand Duchess Catherine, in Russia, and had been so for some 14 years; that she was of Tartar origin, and related to the high nobility of Russia; that she had inherited large estates in Russia, and was the possessor of large wealth and high social position there; that she was the first lady of her rank who had ever visited the United States.

That there had been packed in her large trunk at M'r's Horn's house, in New York, before going to Albany, a large quantity of rare and most valuable laces wrapped in blue envelopes, (which are the laces sued for;) that she had much lace besides, but none so handsome. She then proceeds:

The laces were not attached to either of the dresses spoken of. There were of the laces three flounces to begin with: these I called "point d'Alençon." I was told here they were called "regency lace." There were 33 archines, Russian measurement, in all; three flounces, each flounce about 2 feet in width. There was some lace for the cape and waist of the same kind. There was for the waist 11 archines and for the
33 cape 6 archines, Russian measurement.

2nd. There were also five flounces of what is called "old English point lace," very old. The width was about 8 inches to one-third of a yard.

Each flounce was 11 archines in length, Russian measurement. For the cape and waist of the dress to which these five flounces belonged there were 12 archines of lace, same width.

3rd. There were two flounces 22 archines in length, and the width of the two together covered the whole skirt, very old English point. The Queen of England is the only other person who has any like it. They were large flounces, each about 30 inches in width.

4th. There were also another two flounces about 15 inches in width, and each flounce 11 archines in length. The quality I do not know. It was the same style as point d'Alençon, but it was not point d'Alençon. It was made in Russia by my ancestors, on their estates in Russia.

5th. There was next four flounces of Flemish lace. This, although Flemish lace, was made, as were all the others, by my ancestors.

The width of these was about the same as the last, about 15
34 inches; two flounces of 10 archines in length, one of 11 archines,

and one of 12 archines. For the waist and cape there were 13 archines.

Of the smaller pieces of lace there must have been, to the best of my recollection, forty-five to sixty pieces, say, on an average, of fifty-five. I judge this by what is left. The width of these averaged from two to eight inches. There was only one piece wider than eight inches, and that was four archines in length.

These smaller pieces were all old English point lace. I had no modern laces. They were all old, both great and small. I don't know exactly how old; but I was always told that they were from two to two centuries and a half old, because my grandmother inherited them.

Q. What were the other articles in the trunk, generally speaking?

A. Dresses, collars, sleeves, and other articles of ladies' dress. There were five compartments in the trunk. The laces were not in the first, which was devoted to linen, &c.; but they were placed in the second, third, and fourth.

35 As to how it happened that I had so many laces in my trunk, it was my custom; and what may appear to you extraordinary was to me a matter of course, it was a necessity.

I was born in them; and to all still further it does not appear to me anything extraordinary, as, indeed, I sent back from London all my articles of luxury in the way of toilette and brought with me my strict necessaries, and now I have nothing left to put on.

As to the extent of my journey I cannot exactly say; but I intended to see the prairies, the forests, and the birds of America. I did not come to seek society nor to stay in New York, but might visit California, New Orleans, and Havana, and wanted to go to Rio Janeiro. I wanted to go to a warmer climate, and intended to stop at Chicago and reflect whether to go to California, New Orleans, or Havana.

Cross-examination:

Q. What was your maiden name?

A. Olga.

Q. What was the name of your father?

A. Chodianzaff.

Q. Did you make any visits in New York before you went to Niagara?

A. No; not even to the Russian consul.

36 Q. What did you have in your large trunk besides the laces?

A. I had three velvet robes, linen clothes, collars, pellerine, sleeves, corsage, one cashmere shawl, and two morning dresses. On one of them there were gold buttons, with diamonds set in them; on the other, garnets set in gold, each one valued at twenty dollars. There were eight garnet buttons and six buttons of diamonds set in gold. The diamond buttons were worth more than the garnet buttons. There were five compartments in the trunk; in the top compartment were petticoats, morning dresses, and gloves, pocket-handkerchiefs, camisols, stockings, and a fur cloak and wool mantilla, a cashmere shawl, one night dress.

Q. What was in the second compartment?

A. One black velvet dress, two black silk dresses, one blue silk petticoat. There were some laces under this velvet dress in the bottom of this second compartment.

Q. What was in the third compartment?

37 A. There were laces wrapped in some blue stuff, one silk-velvet dress; that was all. In all the compartments the laces were under the dresses.

Q. What was in the fourth compartment?

A. One lilac velvet dress trimmed with ermine. There were also laces under this dress.

Q. What was in the fifth compartment?

A. There were also laces in this in pieces, soiled collars, sleeves, some laces for the head, some handkerchiefs trimmed with laces, and quite at the bottom there were two corsage with gold buttons and diamonds set in; these are the same as those mentioned before. I had shown these laces to M'r Phipps, because he had heard that I had so fine laces, and he asked me to show them to him. I did not show the whole to him, only a part.

Q. When had you last worn the laces that were on your bridal dress?

A. I put them on at London at the opera. I wore all my dresses in London.

Q. As to the laces you have lost, when did you last wear them?

A. In London.

Q. Have you any of the dresses that those laces were worn on in London?

A. No.

38 Q. Have you now, or had you when you started from New York, any dress that the laces which you have lost had ever been worn on?

A. No.

Redirect examination:

Old English point is extremely difficult to find anywhere because the art of making it has been lost. Formerly I heard it took a year for an artist to make a yard. Point d'Alençon is a lace that is made in relief; it is made strong to put in silks or for a heavy dress, but old English point is very fine, but modern English lace is heavy and coarse. Flemish point is of an entire' different description, more in squares and not round, of a thicker design, but not in relief.

They were not imitations, because it was not possible to make imitations of them, but they were of the description and design I have stated. It is not possible at this day to make laces like these laces, because the art has been lost, and they now make them quick.

The deposition having been read to her she stated that the questions were put to her in French by an interpreter, and her answers
39 were translated into English.

When I was asked what was my maiden name, I answered Olga. I did not understand the question as calling for my surname. The fact is I was baptized Barbara, but, as it was a name my aunt did not like, among my acquaintances I was called Olga, but my christian name is Barbara.

Plaintiff states that the trunk now placed in the hands of the commissioner, &c., marked "C, E. L. O., March 2, 1870," is the trunk in which the laces were contained, and is in the condition in which it was found at Niagara.

(Defendant's counsel objects to the trunk being received as an exhibit, on the ground that it is incompetent and improper. Same admitted. Defendant excepts.)

The lock now produced was on the trunk. The same is marked "D, E. L. O., U. S. C., March 2, 1870."

(Same objection by counsel for defendants as above. Same admitted. Defendant excepts.)

40 The witness further states that in further correction of the testimony she shows and offers in evidence, to be marked by the commissioner, various pieces of lace, which are of the same workmanship as the lost laces, but not the same fabrics, only that they are smaller than those lost. Same are marked "F, E. L. O., U. S. C., March 2, 1870;" "F, E. L. O., U. S. C., March 2, 1870;" "G, E. L. O., U. S. C., March 2, 1870;" "H, E. L. O., U. S. C., March 2, 1870," "I, E. L. O., U. S. C., March 2, 1870;" "J, E. L. O., U. S. C., March 2, 1870."

(Same objections as above noted by counsel for defendants.)

Recross-examination:

Q. Were the laces lost of different qualities?

A. They were.

In the course of the deposition the following questions were asked on behalf of the plaintiff, and objections made on behalf of the defendant, and on their admission the following exceptions taken by defendant and the answers received subject to the objections and exceptions in each case:

Q. Were these laces that you have spoken of so arranged as to be put on and taken off of dresses, and other apparel, and were you
41 in the habit of travelling with them on your different articles of apparel, or separated from them?

(Counsel for the defendant objected to the same as irrelevant and incompetent. The court overruled the objection, and counsel for defendant then and there excepted to such ruling.)

A. Always separated, but they were arranged so as to be fixed on the dresses.

Q. State the position, occupation, or employment of your husband, also your and his social position there, and of what family or connection you are.

(Counsel for defendant objected to the same as incompetent and immaterial. The court overruled the objection, and counsel for the defendant then and there excepted to such ruling by the court.)

Q. What was the occasion of your coming to this country, and when did you arrive here, and with whom did you come?

(Counsel for defendants objects to the same as incompetent and immaterial; and on the further ground that the object of the plaint-
42 iff's journey does not affect the liability of these defendants. The court overruled the objection, and counsel for defendants then and there excepted to such ruling by the court.)

Q. What style or character of articles of apparel did your baggage contain with respect to their richness or value apart from the laces?

(Counsel for defendant objected to the same as leading and irrelevant and immaterial. The court overruled the objection, and counsel for defendant then and there excepted to such ruling.)

(Signed) BARBE DE FRALOFF.

Annexed to said deposition is the commissioner's certificate in the usual form, except that the clause as to the interpreter reads as follows:

"And the witness was by me first carefully examined and cautioned, and sworn to testify the truth, through the sworn interpreter, the whole truth, and nothing but the truth, and deposition was by me reduced to writing in the presence of the witness and from her statements, and after having the same carefully read over to the witness by J.
43 C. T. Buckley, her counsel, the attorneys for defendant con-

senting to such reading, and also by J. W. Gerard, j'r, her counsel, she subscribed the same in my presence."

Counsel for the plaintiff then read in evidence from the second deposition the direct examination of the plaintiff taken de bene esse as follows, subject to the same objections, rulings, and exceptions as the first deposition.

This second deposition of plaintiff was preceded by the usual certificate to the commissioner as in the former.

Q. You have been examined before in this action, have you not?

A. Yes.

Q. The questions were put to you through an interpreter, were they not?

A. Yes.

Q. Have you always understood the questions?

A. I thought I did, but I find there are many things which, though not very grave, are not well translated.

Q. Have you read the testimony taken before M'r Owen on the 2d March?

A. They did not read it to me before I signed it, but I have since read it.

Q. Do you find any mistake or error in the translation which you wish now to correct or explain?

44 A. Yes, I do.

Q. What is it?

A. I have said there that I showed various pieces of lace which are of the same design as those lost and of the same workmanship as those lost, but not the same fabrics; I don't think I was understood, or that my answer was well translated. I said, speaking in French, that the laces were of different fabrics as between themselves.

Q. Explain what you mean by their being of different fabrics between themselves.

A. For example, a set which was of point d'Alençon was of one fabric or name, and the sample of the smaller lace would be of the same fabric or name.

Q. Do you wish to give any further explanation?

A. All I wish to say is that the laces lost were as to quality, price, and value, in kind and the same workmanship as the patterns I produced, absolutely the same thing, only those lost were of necessity dearer, as they were larger than the pieces I produced and which were little for the handkerchief.

Cross-examination:

Q. Will you state the kinds and the names of the several
45 pieces of lace you have presented and had marked as samples?

A. A piece that I called before point d'Alençon but now they tell me it is point de regency. It is here they told me that another, Flemish point, another piece of the finest quality of old English point, we cannot see finer, and all the other pieces were of old English point, but not so handsome as the other. I brought six pieces altogether. I have stated all the names and kinds.

Q. Did you take away either of the pieces you produced without its being marked?

A. I brought them all in a box; they were all marked, and I have not opened the box; I wished to bring that box with me here to-day, but I forgot it; I left it in my room on the mantle-piece.

Q. After the pieces produced as samples had been marked did you withdraw one of them as not to form a portion of the samples produced?

A. I did not withdraw the piece, but I asked the commissioner to let me take a collar which he had marked, but I put it back in the box, but I will take it.

Q. Was the mark taken off?

A. I really cannot say.

46 Q. How many pieces of old English point were there among the samples aside from this collar?

A. I brought the tunic, then I brought a piece for the head from the toilette, of five flounces. There were three pieces without the collar of old English point.

Q. How were those three pieces marked by the commissioner?

A. No, sir; I have not opened the box and I have not looked.

Q. You took away from the commissioner all the laces you produced as samples?

A. Yes, sir.

Q. Are these laces, both the samples and the others you brought over, of different fineness, quality, and value between themselves?

A. The samples were, and the others were just the same as the samples.

BARBE DE FRALOFF.

Annexed to said second deposition is the certificate of the commissioner, which is in all respects similar to the one annexed to the first deposition.

Waldemar de Bodisco, called by plaintiff, being duly sworn, testifies as follows:

47 I am consul-general of Russia for the United States. In 1869, part of the year, I was chargé d'affaires for Russia at Washington; the other part I was secretary of legation; then the Russian minister was M'r Catecazy.

His further testimony tended to show that he met Madame Fraloff subsequent to the alleged loss at M'r Catecazy's house in Washington, where she had called to complain of her loss. He had never heard of her before that. He there saw her passport and some other papers, the character of which he could not recollect; that a Russian archine is 28 inches; that he afterwards saw her at the Arlington House in Washington, and she complained that she had no protection from the legation.

In the course of the examination of this witness the following questions were asked on behalf of the plaintiff, and to their admission the following exceptions for defendant taken, and the answers received subject to objection and exception in each case:

Q. Will you please state, from what knowledge you possess, what is the position of that lady's social position, and her character,

48 standing, and means, so far as within your knowledge?

(Counsel for defendant objects to the same as immaterial. The court overruled the objection, and counsel for defendant then and there excepted to such ruling.)

Q. State all the sources of information you had with respect to the character and standing of this lady or her husband of every kind.

A. So far as my recollection goes now, it is about five years ago, there was a correspondence in relation to her to find out who she was; and, so

far as I remember, the answer came that she was the wife of Colonel Fraloff, colonel of dragoons, in Tambof.

(Counsel for defendant objected to the foregoing answer on the ground that the letters themselves should be produced in evidence, and that otherwise the evidence is incompetent, and moved that the same should be stricken out. The court overruled the objection and denied the motion, and counsel for defendant then and there excepted to each of such rulings.)

I do not know whether the letters were from the government officially. They came from where the government was, at Tambouff, the
49 capital of Tambof.

(Counsel for defendants objects to the proposed evidence as immaterial and incompetent, and, such as it is, for being gained through the plaintiff and long after the alleged cause of action arose. The court overruled the objection, and defendant excepts.)

The witness proceeds:

The result of these inquiries was that she was Madame Fraloff, the wife of Colonel Fraloff, as she said she was. I know the name of Fraloff in connection with Russian families of position.

(Counsel for defendant objects to this general course of examination as incompetent and immaterial. The court overrules the objection. Defendants' counsel excepts. Counsel for defendants takes a general exception on the grounds above, stated in order to obviate the necessity for repeated exceptions.)

They are names known in Russia. I am familiar with Russian family names—names of people of rank and position. I know a great many Fraloffs in Russia, persons of position. Maluta is another name
50 which dates back as far as John the Terrible. Tartar families in Russia are families of position there; although descended from the Tartar race, families of nobility and position. I am not aware that Maluta is of Tartar origin. There are persons of that descent of position and rank in Russia.

I have no other means of knowledge whatever other than I have stated as regards this lady's reputation.

This lady was recognized at the legation as a Russian subject, and conversed with there in the Russian language and in French.

The different ranks of nobility in Russia, beginning at the top of the ladder, are the Imperial family, then grand dukes and grand duchesses, then come princes, counts, barons, and knights. Those ranks extend to females as well as males. I do not know that M'r's Fraloff was in any one of these.

Counsel for plaintiff then read in evidence the direct examination of Ernest Henrich Von Weber, taken de bene esse before a U. S. commissioner, which tended to show that he was acquainted with the plaintiff in this case, and had known her since her childhood, and had
51 met her in London in the month of July, 1869, to accompany her to America.

We arrived in New York about the 29th of September. The plaintiff was always very sickly, and the most in a cold climate. She has always been very delicate. When she left London to come to this country she was sickly and changing—that is, varying health. The slightest cause was sufficient to make her very sick.

I was with plaintiff at Paris before coming to America. In Paris I was obliged to accompany her to all the great lace stores, she being in search of a piece of lace for shoulders similar to the bridal dress of her

aunt Marie, she having no piece around the shoulders in that style, and it was impossible to find in all Paris a piece like this.

The last lace described in the testimony of the plaintiff was what I called point d'Alençon, old regency point, and old Flemish point, and they were all of the most beautiful quality, and admired everywhere. They were like a cobweb, and a little yellowish color from age. They were all white laces.

52 I have seen the laces which are the subject of this action, and I have seen Madame Fraloff wear them often in different places to go to the opera, theater, or receptions or visits. I helped always to pack the laces in Madame Fraloff's trunk, and saw them in at the very last moment before I locked it. I locked the trunk of Madame Fraloff just as we left M'r's Harn's house in New York. There were two locks, one of them very complicated, and the other a padlock on the outside.

I opened the trunk in Albany twice, and the contents were all right, and I saw the blue border of the envelope that contained the laces. I saw the trunk taken to the depôt of the New York Central and Hudson River Railroad at Albany. I received it at the depôt and checked it to Niagara, having first purchased two tickets from Albany to Niagara by the New York Central Railroad. The trunk was in good order when checked. When we arrived at Niagara the baggage-man showed me the trunk broken open.

T e locks were torn off by force and hanging, and the contents of the trunk so disturbed that it could not be closed.

53 That they arrived at Niagara at a quarter to one o'clock at night, and put up at the Niagara House, as all the large hotels were closed for the season.

When I examined the trunk at the depôt at Niagara Falls, in the second, third, and fourth compartments three packages of laces, of which one had been in each compartment, had disappeared with the envelopes. There was a package of lace in the fifth compartment, of small laces hidden between the linen, that was there, which had not been disturbed.

At New York, when Madame Fraloff was seated on her bed counting, enveloping, and stitching in the envelopes the laces, I saw her. In counting Madame Fraloff told me that two small shoulder-pieces belonging to one of the dresses were missing; that they must have been stolen at Havre or Paris. I asked her the value. She said two or three thousand francs.

Madame Fraloff was very fond of and wore a great deal of elegant wearing apparel. She always wore a very rich toilet, and generally travelled with beautiful dresses, very rich and elegant. We

54 brought $12,000 with us for our traveling expenses in this country.

The plaintiff then called as a witness Rudolph A. Witthaus, who, having been duly sworn, testified among different matters as follows, on his direct examination:

I am a resident of this city and have been engaged in mercantile business here about 41 years. I have been out of business for about 11 years. I now reside at 31 West 34 street. I was formerly one of the commissioners of emigration. I remember travelling from Albany to Rochester in the fall of 1869. I was in the southeastern corner of the drawing-room car; I met the plaintiff in a drawing-room car.

The plaintiff, in speaking to me in the car, said that she was a Madame Fraloff, from S't Petersburg, traveling through the United

States; and I told her I thought she was a Russian lady by the sable which I saw she had on her. She did not tell me what baggage she had, but in the course of a conversation she asked me, as she said she was traveling around. She said she had some valuable laces and
55 they embarrassed her, and asked me if I could not advise her to get a place where she could put them. I told her A. T. Stewart or Arnold Constable and company were the best place she could find; she didn't tell me that she had any laces with her; she merely said she had laces, and as she was traveling around she would like to know what to do, because they embarrassed her. She had a satchel, and she said in that satchel she had some valuable jewelry, amongst others a very handsome *ceinture* set with precious stones. She was going to open it, and, says I, "Madame, I do not think a rail car is a proper place to open a bag of that kind, and I would thank you not to open it." Mr. Von Weber then said, "I think the gentleman is perfectly correct in that."

On being cross examined, the witness testified as follows:

I do not know of any lady of wealth and high social position in this country carrying with her rich old laces, in traveling, to the amount of 200 to 267 yards, as declared upon in the complaint, and of the value of anything like $150,000 to $200 000.

I have seen many laces and have dealt in them at one time,
56 but not specially, merely as merchandize.

Counsel for plaintiff then read in evidence the direct examination of Charles Robert Orten Sachen, taken by consent, before trial:

I am familiar with the Russian language perfectly. I was born in Russia, S't Petersburg. I was first secretary of legation in Washington and was afterwards consul-general here ten years. I have seen M'r's Fraloff, the plaintiff in this action, a Russian lady who was in this country in 1869. She called on me on the business of that trunk; I did not see her before.

His further testimony tended to show that he afterwards called on her in 23d street, New York, and the trunk was opened in his presence, when she took out of it a separate set of gold buttons, with stones, not diamonds, and that it was a pretty full trunk.

Counsel for plaintiff then offered to read the deposition of Peter Wycoff, in the Russian language, and of Michel Simeon de Fraloff, in the French, taken under a commissio*ner* issued out of this court for the examination of them and other witnesses in Russia. And counsel
57 for defendant objected thereto, but was directed by the court to reserve his objections until they would come up specifically.

Alexander Paroche being called as a witness on behalf of the plaintiff, to prove that a certain paper then shown to him was a correct translation of a certain deposition or commission in the Russian language, now on the file of this court, and hereafter to be offered in evidence on the part of said plaintiff.

(Counsel for defendant thereupon objected to the introduction of said evidence and to the examination of the witness on that subject as immaterial and irrelevant, and that the deposition should be in the English language and not require translation. The court overruled the objection, and counsel for defendant then and there duly severally excepted to such rulings.)

And said Paroche then gave testimony tending to show that a paper shown him was a correct translation of certain testimony taken in the Russian language.

Counsel for plaintiff then offered the deposition of Peter Wy-
58 coff, above named, taken in Russia and in Russian language, under a commissioner, and offered to read the translation thereof, spoken of by the preceding witness, Paroche.

Counsel for defendant thereupon objected to the said deposition and translation thereof on the following grounds:

1. That the answers in the original deposition were taken in the Russian language, and cannot be received as part of judicial proceedings in the United States, and it is contrary to the statute of the State of New York.

2. That the sanction of the oath of the witness was not given to the translation.

3. That the taking and filing of the testimony, in foreign languages is in violation of the statute which prohibits the filing of the deposition and making it any part of the proceedings in the case.

4. That it involved an expense to the defendant to ascertain what the testimony is to its prejudice and damage, which is clearly illegal.

5. That the commission was directed to one person with the alternative of its being executed by a second person in case of the death
59 or absence of the first, and it appears that both of the parties joined in the execution of the commission.

6. That it does not appear by whom the oath was administered to the witness, and for aught that appeared the oath might have been administered by the second one of the two named, or by a third person, either of whom had no authority to execute the commission.

7. That it does not show that the witness was cautioned or sworn according to law, or that the testimony was read over to the witness or reduced to writing in his presence before the magistrate, and signed before him by the witness.

8. That objections to the admission of the deposition were taken in open court about two years ago, so that the plaintiff had full notice of the objection thereto on the part of the defendant, and that the former ruling which excluded the deposition on that trial is binding in this action.

9. That the court exercised and expended its authority in respect to the translation in issuing the commission with instruction to have the answer translated into English.

60 10. That the answer should have been translated by the same interpreter who translated the questions.

11. That the translation is not reduced to writing in the presence of the magistrate and signed before him by the witness.

12. That it does not appear who was the interpreter of the interrogatories into Russ, nor that such interpreter was duly cautioned and sworn.

13. That the defendant is taken entirely by surprise by the testimony which it may contain to its prejudice and damage.

14. That the document is not a commission, and consequently not evidence.

15. That the witnesses themselves should be produced personally, there being no proof that they are not now within the jurisdiction of the court.

16. That the paper proposed to be read is insufficient and incompetent.

17. That the testimony itself is incompetent and immaterial.

18. That the defendant cannot read the answers to cross-interrogatories, and is therefore cut off from the benefit of them.

The court thereupon overruled each and all of the objections
61 above mentioned, and counsel for defendants then and there excepted severally to such rulings.

Counsel for defendants thereupon demanded that the answers to the questions annexed to said commission should be read in the language given by the witness and subscribed to by him in the presence of the commissioner, and stated that said demand applied severally to each of said answers.

The court refused to grant the said demand as to each of said answers, and counsel for defendants then and there excepted to such refusal and rulings.

Counsel for the plaintiff thereupon read from the paper testified to by the witness Paroche in answer to the direct interrogatories, and addressed to Peter Wycoff, and also read said direct interrogatories as follows, the commission being in the usual form and addressed as follows:

To Prince Jean de Kongoucheff, justice of the peace in the service of the imperial crown, and in case of his death or absence to his
62 excellency Pierre Vladimir de Elaguic, president of nobility at Tambor, Russia, as commissioner, &c.

First interrogatory from the commission. What is your residence and occupation, and how old are you?

Answer read from the paper testified to by the witness Paroche. I am 82 years old. I live on my estate, the village of Carrowin, the government of Tamboff, district of Tamboff.

Second interrogatory from the commission. Do you know the parties to this action referred to in the title to these interrogatories? If so, how long have you known them, or either of them?

Answer read from the paper testified to by Paroche. I am acquainted with Madame Fraloff since her childhood.

Third interrogatory from the commission. Do you know the parentage and family connections of the plaintiff? If so, state fully your knowledge thereof.

(Counsel for defendant objected to the same as immaterial, ir-
63 relevant, and incompetent. The court overruled the objection, and counsel for defendants then and there excepted to such ruling.)

Answer read from the paper testified to by Paroche. I am acquainted with her whole family, as well as with that of her husband; both enjoy an excellent reputation and a general esteem.

Fourth interrogatory from the commission. What is or has been your social connection or acquaintance with the plaintiff, Madame Fraloff? Are you connected with plaintiff by blood or marriage? If so, in what degree; declare fully.

Answer read from the paper testified to by Paroche. I am not a relative to Madame Fraloff, but as our estates are contiguous we often meet at our respective houses, besides meeting in society.

Fifth interrogatory from the commission. What is the station and position in life of the plaintiff? State fully.

(Counsel for defendant objected to the same as immaterial and
64 incompetent. The court overruled the objection, and counsel for the defendants then and there excepted to such ruling.)

Answer read from the paper testified to by Paroche. Madame Fraloff belongs to an old noble family. She owns large estates by inheritance, and her social position corresponds to her extraction, her wealth and education.

Eighth interrogatory from the commission. Do you know whether or not the plaintiff is a married woman? If you say that she is, then state if you are acquainted with her husband; and, if so, state what is his position or rank in life.

(Counsel for the defendants objected to the same as incompetent, irrelevant, and immaterial. The court overruled the objection, and counsel for defendants then and there excepted to such ruling.)

Answer read from the paper testified to by Paroche. M'r's Fraloff is the wife of Colonel Fraloff. I am well acquainted and very much
65 attached to her husband. He is in active service in the Regia Regiment of Dragoons of Her Imperial Highness Grand Duchesse Catherine Mikhailowna.

Ninth interrogatory from the commission. State, if you know, what are the means or property of the plaintiff and her husband in general, and what sources, incomes, or resources therefrom, and if they are persons of wealth or otherwise.

(Counsel for the defendant objected to the same as incompetent, irrelevant, and immaterial. The court overruled the objection, and counsel for defendant then and there excepted to such ruling.)

Answer read from the paper testified to by Paroche. Madame Fraloff possesses several estates by inheritance. Her husband, Colonel Fraloff, is the proprietor of estates which he has purchased after having sold out his hereditary estates. They live on the income of their estates. This is a family of large wealth; they have an excellent social standing.

66 Tenth interrogatory from the commission. State in what social circle in Russia the plaintiff moves.

(Counsel for defendant objected to the same as immaterial, irrelevant, and incompetent. The court overruled the objection, and counsel for defendant then and there excepted to such ruling.)

Answer read from the papers testified to by Paroche. Madame Fraloff by her birth and wealth belongs to the highest circle of society.

Last interrogatory from the commission. State, if you know, any other matter or thing touching the matters in controversy which may be of any benefit or advantage to the plaintiff; if yes, declare the same fully and at large as if you were particularly interrogated thereunto.

(Counsel for defendant objected to the same on the ground that the witness is not shown to possess any knowledge of the matters in controversy. The court overruled the objection, and counsel for defendant then and there excepted to such ruling.)

67 Answer read from the paper testified to by Paroche. Being one of the oldest men in our locality, and, thank Heaven, in full possesion of my memory, I can fully affirm that I am acquainted with Madame Fraloff, and remember everything connected with her from the day of her birth to that of her marriage and beyond, and therefore I can affirm that all I know about her speaks in her favor.

(The deposition is signed by both commissioners, to whom it is addressed in the alternative.)

Counsel for the plaintiff thereupon read the deposition of George W. Phipps, as follows:

I saw Madame Fraloff, the plaintiff in this case, at a house, 229 West 23d street, where I was then staying; it is kept by M'r & M'r's Horn.

I remember seeing articles of lace in the possession of Madame Fraloff in the fall of last year at that house, a few days before her leaving for the West, in a trunk in her room; she took them out and showed them to me. There was a very large amount of the most beautiful laces

I had ever seen; they were in forms of flounces, I think, and different parts of the dress.

68 I had been accustomed to seeing laces during my life. I consider myself a judge of their general appearance, but not of their relative value. They were so very fine that I could not give an estimate within 50 or 100 dollars a yard. They were in different pieces of different widths; most of them were flounces of all widths. They were wrapped up very carefully, and covered, I think, with some kind of tissue paper; I think the paper was of a bluish color. Those I saw were perfect gossamer, just like cobweb as to fineness. I advised her, if she was going to travel, to deposit them in some very safe place.

Counsel for plaintiff thereupon read the deposition of Henrietta Horn, tending to show that she kept the boarding-house No. 229 West 23d street, and M'r's Fraloff and M'r Weber boarded there both before and after going to Niagara; that she saw in M'r's Fraloff's rooms, before her trip to Albany, a very great quantity of the most magnificent laces that anybody ever saw.

(Counsel for defendants objects severally to any and all state-
69 ments of this witness in said deposition contained as to what plaintiff had, or what any one saw in New York, as irrelevant and immaterial. The court overruled the same, and counsel for defendants then and there excepted to such ruling, as to each and all of said statements, as if the said objection, ruling, and exception were repeated as to each and all of them.)

These laces were flounces, and laces separate and not attached to dresses. I believe some were about a half a yard deep. There were three or four different sizes. They could only be used for going to court; they could not be used anywhere else; they were too magnificent. They could be used to go to grand gala, or to go to see ambassadors. I should call them old malinaise, or old English lace, or old point. They were old-fashioned leaves, roses, or flowers. I could not tell whether they were of different manufacture or not; they were not modern. I saw her pack her trunk and put in these laces in blue envelopes.

On being cross-examined by counsel for defendants the witness testified as follows:

70 During the period they were at my house, before they went to Niagara, madame was never out; they were never out in the day time. Nobody called on her while at my house; she was sick and was confined in bed the whole time. She never attended meetings or places of amusements.

She had no attending physician no part of the time she was at my house. I doctored and nursed her.

The laces looked very old and very magnificent. I never saw such a thing before; such a quantity and such a beautiful thing. She never wore any of these laces here. She had no servant here.

Counsel for the plaintiff then read the deposition of M'r's Ellen Ross, taken de bene esse before a commission, as follows:

Witness affirmed:

My name is Ellen L. Ross; I am 29 years of age; I am the wife of George Ross and reside at Daylestown, Pennsylvania. Was married in 1870. In the fall of 1869 I with my father lived at 229 West 23d street, New York City.

Just after plaintiff started for Niagara, I went to that house, in
71 December, 1869. I saw plaintiff at that house shortly after her return. She was generally in bad health; she was an invalid.

I know M'r Webber was at the same house with her. In calling him she used "Henry;" making fun of him, "Henrietta—only a woman," she would say in French when speaking of him.

The plaintiff was known while residing in 23rd street as Madame Maluta. I never heard her called by any other name.

I saw laces in the plaintiff's possession of many varieties. Among those varieties there were valuable laces; all was valuable. The pieces I saw were very old and not to be valued in this country. I cannot compare them with the laces supposed to be lost, which I never saw. I should suppose them not to be one-twenty-fifth of the value per yard of the supposed lost laces.

On being cross-examined the witness testified as follows:

Q. From what source did you derive such information as you have concerning the laces lost by plaintiff?

A. From my father.

Q. What did he tell you about them?

72 A. He described them as a marvel of beauty, fine as cobwebs, with exquisite designs, like nothing ever brought to this country, resembling the old-country church-lace, or lace inherited in royal families.

Q. What do you mean by old church-lace?

A. I mean such laces as only are seen in the altar and priestly decorations of the richest Roman Catholic churches.

Q. When had your father seen them?

A. In Madame Maluta, the plaintiff's, room; that is, my father told me he had seen them there.

Q. Did Madame Fraloff tell you the names and give you any description of the laces lost?

A. No.

Q. Did she tell you anything about them; and, if so, what?

A. Yes; that they descended to her as heirlooms through 400 or 500 years.

Counsel for the plaintiff then read in evidence the affidavit of Jeremiah C. Kennedy, which tended to show he was in the employ of the proprietors of the Delevan House in Albany, and engaged in driving

73 the baggage-wagon attached to said house; that on the fourth day of November, 1869, he conveyed in said baggage-wagon, from said Delevan House, by the direction of M'r's Fraloff, a large black wooden trunk to the New York Central Railroad Company's depot in Albany, and the said trunk was there delivered to and checked by the baggage-master of said company to Niagara; that when he received said trunk, and when the same was delivered to the baggage-master, as aforesaid, it was in good condition and safely and securely locked and fastened.

Counsel for plaintiff then read the statement of John Sault and James Crowley, which tended to show that they were railroad employees of defendant at Niagara; that when said trunk arrived at Niagara on Thursday night, November the fourth, 1869, it was broken entirely

74 open, and that, anticipating trouble, Crawley put a strap and lock on it; that trunk was opened November 5th in baggage-room.

It is admitted by counsel for defendant that defendant was, at the time when the loss of laces is alleged by plaintiff to have taken place, a common carrier of passengers and freight for hire.

It is admitted by counsel for plaintiff, for the purposes of this action, that no disclosure of the character of the plaintiff, nor of the value or

nature of the plaintiff's baggage, was made to the defendant previous to the loss alleged in the declaration herein.

It is admitted that the distance from Albany to Niagara Falls is 310 miles.

It is also admitted that the plaintiff left this city for Europe some time in the late spring or early summer of 1870 without having gone anywhere, except to Washington and back, after her return to this city from Niagara.

Counsel for the plaintiff then called as a witness JOHN M. TOUCEY, who, having been duly sworn, testified as follows on his direct examination:

75 I am superintendent of the Hudson River division of the New York Central and Hudson River Railroad. I have no general superintendence above Albany.

On being cross-examined by counsel for defendant the witness testified as follows:

The custom has been, since I have been connected with the road, to exact extra compensation for baggage, more than we consider a passenger should carry. In other words, we consider a passenger entitled to 100 pounds of baggage and charge extra for all beyond that. We generally charge extra, if we are aware of it. We are not very exact. We charge extra if it is over 100 pounds to a person, no matter what it is. Anything that is not strictly in the line of baggage we charge extra for.

Q. I want to ask you what would have been done if the plaintiff had declared that she had a very large amount of valuable laces in this trunk at the time she presented it for checking?

(Counsel for the plaintiff objected to the same; the court sustained the objection, and counsel for defendant then and there excepted to such ruling.

76 Defendant's counsel offers to show that had the value and character of the contents of this trunk been declared at the time it was presented for checking as her baggage, the company would have refused to receive it, or would have charged at least a rate of ⅛ of 1 per cent. upon the value for its compensation for transporting it, and that it was the usual course of business or custom of the defendants in regard to all baggage when value was declared. The court excluded the offered evidence, and defendant's counsel then and there excepted to such ruling.)

Q. From your acquaintance with the baggage that is carried by the defendant, will you state what is the average value of baggage carried by the defendant, the usual and ordinary value of a single trunk of baggage?

(Objected to; the court sustained the objection, and counsel for defendants then and there excepted to such ruling.)

77 Defendant's counsel proposes to show that a great deal of the baggage that was carried by the defendant, and was at that time, ("of course all my remarks relate to that period,") was not worth over $50 a trunk, and that from $150 to $200 was the average and usual value of the trunks carried by the defendant. Same objection, ruling, and exception.)

Q. What is the custom of the defendant on the declaration of the value of the baggage?

(Counsel for plaintiff objected to the same; the court sustained the objection, and counsel for defendant then and there excepted to such ruling.)

Counsel for the plaintiff then called as a witness JOHN L. ROFF, who, having been duly sworn, testified as follows on his direct examination:

I have been in the business of buying and selling laces for upwards of 20 years, both in this country and in Europe.

Q. Are you familiar with these characters of laces that I shall mention?

78 (Counsel for the defendant made the preliminary objection, to apply generally to all the witnesses who may be sworn for plaintiffs, that in the absence of samples of lace an expert cannot testify. The reading to an expert what has been said of the general characters of laces by other witnesses is objected to. He does not thereby become qualified to judge of their value.

The court overruled each of the objections, and counsel for defendants then and there excepted to each of such rulings.)

Q. Are you familiar with point d'Alençon or old regency point, old English, or point d'Angleterre, as it is called in French; old Brussels and Flemish lace?

A. Yes; I know something of them, and have dealt in them from time to time.

Q. Have such laces a market value either in this country or in Europe, and have they had since 1869?

79 (Defendant's counsel objects to evidence as to value in Europe; the court overruled the objection, and counsel for defendant then and there excepted to such ruling.)

A. They have.

Q. They are more or less exposed for sale?

A. Yes, sir.

Q. I shall ask you first as to the value of regency point. Is that another name for point d'Alençon?

A. I call it "point d'Alençon." I don't understand what you mean by regency.

Q. State the market value about 1869 of point d'Alençon lace; and, if there has been any material difference, state it, in the value of point d'Alençon in the shape of flounces attached to a lady's dress, and also for a waist and cape to be attached to a dress of the same character, what they call a "toilette," I think is the word, which lace was of the width of, say, two feet, and in a piece of the length of at least 924 inches, per yard.

(Objected to as incompetent and immaterial. Exception.)

A. About $600 per yard.

80 Q. I ask you whether there is any difference between such lace of a modern character and lace of a more antique character—work, say, of two centuries back; and, if so, will you please state whether the antique would be expensive or the modern more expensive.

(Same objections, ruling, and exceptions.)

A. I can only answer by saying that d'Alençon lace is an antique lace. D'Alençon lace, as I understand it, is a lace that is peculiar of itself. It is not in the market, but it is quite an antique lace, which is now not for sale, but it was at that time.

Q. And had a market-value?

A. Yes.

Q. Suppose the lace to be equal in every other way, does the increase of age add to its value or detract from it?

A. I think at the present time it would rather add to its value.

Q. About old point English lace: what is the peculiar characteristic of that?

A. I cannot describe it to you; I know it when I see it.

Q. Is it well known to the trade?

81 (Objected to as incompetent; admitted; defendant excepts.)

A. Yes, sir.

Q. I should like to call your attention to what has been testified by the plaintiff here, to a piece of lace, old English point, of five flounces, one-third of a yard, or twelve inches, wide, each flounce eleven archines long, or twenty-five yards altogether, to go 'round a lady's dress; also a waist and cape. I should like to know what was the market-value about the fall of 1869 and subsequent to November.

(Same objections, rulings, and exceptions.)

A. I should think about $150 per yard.

Q. Are you testifying as to old point English, or to other English?

A. I am testifying to old point English, as I understand it.

Q. I call your attention to another piece of old English point of 30 inches wide—2½ feet, or thirty inches, wide—which is in two flounces, what is called the third dress, covering, as the lady states, nearly the whole skirt of the dress: I should like to know what the market-

82 value of that would have been about that time in a continuous piece?

(Same objections, ruling, and exceptions.)

A. About $500 a yard.

Q. Come to the fourth dress. Two large flounces 11 archines long—16 yards—apparently (this was old English point to which you have just testified) 30 inches wide. I should like to know what the market-value since November, 1869, or thereabouts was for lace of that description in two flounces of 16 yards, suitable for a lady's dress of old point d'Alençon.

(Same objection, ruling, and exception.)

A. $900 a yard.

The COURT. Let me inquire here as to the length of these flounces. Is that material to the question of value per yard?

(Same objections, rulings, and exceptions.)

A. It is very good to have them in long lengths, that is, provided they are five and six yards. It is better to have them in that way; still I don't think it adds to the value of the lace at all; from 4 yards long, the right length to make a flounce; of it is less than that it inter-

83 feres with the value of the lace; so that, if it is long enough for a flounce it is all right.

Q. Now, we come to the Flemish lace. What was the market-value of lace of that character since November 4th or 5th, 1869, in four flounces—no matter about the exact length—each flounce 15 inches wide, a mantilla, also called white, of the same width, arranged in a lady's toilette?

(Same objections, rulings, and exceptions.)

A. About $125 a yard.

Q. Do you speak of the ancient lace or the modern?

A. Unless you tell me, I would speak of the modern lace.

Q. If the lace were two centuries old, and the texture was the same, would the prices be greater or less; and, if so, how much greater or how much less?

(Same objections, rulings, and exceptions.)

A. I cannot answer that question, because these very old laces are not in the market. They are old-fashioned laces, and certain

84 families want to get hold of these heirlooms. Antique lace is

worth more than modern. I cannot say how much, because I don't know the quality.

Q. As regards the old point English?

(Same objections, rulings, and exceptions.)

A. Old point English is ancient. It is worth from 500 to 600 dollars a yard. I cannot say as to the price of it. I know it is worth considerable. I know it is valuable, but what it is I cannot say.

Q. What is the market-value of old point English, 8 inches wide and about 80 inches long—what would be the market-value since 1869 or about that time of such lace?

(Same objection, ruling, and exception.)

A. About $90 to $100 a yard, I should think, would be about the value.

On being cross examined by counsel for defendant the witness testified as follows: I did not, myself, in the fall of 1869 buy any old point d'Alençon lace nor any old regency lace, nor any old English point, nor any old Flemish point.

Q. Did you sell any of these kinds?

A. Yes, sir.

Q. Which kind did you sell?

85 A. Point d'Angleterre or point d'aiguille, as I understand it, either one or the other. They are very similar laces, about the same valuation.

By the court:

Q. Is that what you call old English point?

A. Yes, sir.

Q. When you put a value upon old English point, you had in your mind the old point d'aiguille?

A. Yes, sir; that is what I understand as point d'aiguille.

Q. How much did you sell of that point d'aiguille?

A. I don't know.

Q. Did you sell any?

A. I could not tell about every piece. It is a good many years ago, now.

Q. You don't remember whether you sold any or not?

A. I cannot say.

Q. How wide was that, you think you sold some years ago—about that time?

A. Well, about five inches.

Q. It is a fact that there is a great difference in the varieties and value of laces that pass by these general names?

A. Yes, sir; certainly.

86 Q. Of the same width and of the same length?

A. Yes.

Q. Are you sure that you mean the same kinds of laces by these various names that the plaintiff did?

A. No.

Q. In answering the questions on your direct examination as to value, did you have in your mind any lace of any kind of them that it took a year to make a yard of?

A. No, sir.

Q. Then, such a fact as that formed no part of your valuation?

A. No, sir; nothing at all.

Q. Did you have in your mind when you were giving your valuation upon these different kinds of laces that any of them were 200 to 250 years old?

A. No, sir.

Q. So that forms no part of the basis of your valuations?
A. Not at all, sir.
Q. Do you know of any ladies of wealth and high social position in this country who possess laces of an age of 200 to 250 years, and of the character that has been described to you in connection with these
87 laces?
A. No, sir; I do not.
Q. Do you know of any lady in America, or any foreign lady of high social position and wealth, who has made a journey with any such laces in her trunk?
A. No.
Q. When you spoke of your valuation in regard to old point English, or old regency point, or, as you call it, point d'aiguille, did you have in your mind the value of some ancient lace possessed by Queen Victoria at the time you formed that opinion?
A. No, sir; I did not.
Q. So that formed no part of the basis of your valuation?
A. Not any, sir.

*Q.* By the court:

Q. Did you ever see any d'Alençon lace 2 feet wide?
A. No, sir; not two feet wide.
Q. Did you ever hear of any till this trial?
A. No, sir; I never heard of any.
Q. Did you ever see any English old point lace 30 inches wide?
A. Yes, sir.

By counsel for defendant:

88 Q. Where and when?
A. In New York and in Brussels, about that date, about 1869 or 1868; all along there.

By the court:

Q. In what quantities?
A. Usually as a tunic.

By counsel for defendants:

Q. By that you mean point d'aiguille?
A. I understand it in that light.
Q. Have you ever been in the manufacture of laces yourself; engaged in that business?
A. Never, sir; not at all, sir.

By the court:

I wish you would state how you arrive at the estimate which you place upon the d'Alençon lace, 30 inches wide and two feet wide.
A. The way I estimate it is according to the width of the popular demand at the present time and also at that time. I estimated this lace at a certain width, and then I made a calculation that if a piece of lace 2½ inches wide is worth so much, another piece wider would come to so much. I based my calculation that way. You spoke of d'Alençon
89 lace 30 inches wide; I have never seen it in that width.
Q. I think you stated that you had not only never seen it, but had never heard of laces of that width until this trial.
A. Not d'Alençon.
Q. I think you stated in answer to the counsel for defendant that these laces vary in texture, in value, and in width.
A. Exactly so.

Q. Upon what do you estimate your value of $500 a yard for 30 inches wide, first quality, or middle quality, or poorest quality?

A. I take the medium quality. I strike the average.

By counsel for defendants:

Q. Do you make your average by dividing the value of the best quality by two?

A. No; it would be a third more, as we understand it.

Q. Is it not more expensive to make long strips of laces, continuous long pieces, than to make short, detached pieces?

A. I should think it would be more difficult to make a long piece
90 than it would to make a short piece, because of the length of time it takes to make it, and the disadvantage of having it all in one regular thing right the way through.

Counsel for defendant thereupon, in pursuance of the stipulation in that regard entered into a former part of the trial, moved to strike out all of the evidence of the preceding witness, Roff, concerning the value of the laces in suit, on the following grounds:

1. That he had not seen the said laces, nor samples of them, nor samples of any laces proved to be like any of them.
2. That the witness has never bought or sold any such laces.
3. That witness swears the said laces have no market value in the city of New York.
4. That it appears from his testimony that they have no market value.
91 5. That the value above given and the value of said laces are entirely fanciful, uncertain, vague, shadowy, unknown, and intangible.
6. That the whole of the evidence is irrelevant, immaterial, and incompetent.
7. That the questions are objectionable and improper in substance and form.

The court denied the motion as to each of the grounds stated, and counsel for defendant then and there severally excepted to such rulings.

Additional evidence as to the value of laces was given by several other witnesses, whose testimony tended to show the value of the laces lost as described by plaintiff from $60,000 to $150,000.

Subject to the same objections, motions, rulings, and exceptions.

Counsel for defendant thereupon moved to strike out all of the evidence as to the value, of each preceeding expert, upon the further ground that the names applied to the various kinds of laces are not understood
92 alike by the different witnesses, and there is no proof that any of them meant the same kind of laces by those names that the plaintiff did.

The court denied the motion, and counsel for defendant then and there excepted to such rulings.

Counsel for plaintiff then asked for permission to reserve the reading of the deposition of Micheal Simeon de Fraloff till the conclusion of the defendant's case, which leave was objected to by counsel for defendant; and the court having granted it, the defendant then and there excepted.

The plaintiff here rested.

Counsel for defendant thereupon moved to dismiss the complaint, and requested the court to instruct the jury as follows:

1. A. That the obligation and contract of defendant with plaintiff is

only to carry her, or if it extends to her baggage, it is only to such ordinary baggage, in reasonable quantities and value, as is usually taken by travelers.

93 B. That articles of great or extraordinary value, such as the laces claimed to have been lost by plaintiff are alleged to be, are not within the liability of common carriers, and defendant cannot be charged with their loss, and the jury should render their verdict for the defendant.

2. That the plaintiff was guilty, whether intentionally or not, of unfair dealing, amounting to fraud, towards the defendant, which deprived the defendant of its just compensation and prevented it from protecting itself against the immense risk to which she subjected it, without notice and without its knowledge or consent, and therefore the jury should render their verdict for the defendant.

3. That the defendant carried for nothing, and delivered to the plaintiff at Niagara Falls, according to her own testimony, much more baggage, or at least as much in value, bulk, and weight, as she had the right to expect or demand; which is a defense and precludes a recovery in this action, and the jury should render their verdict for the defendant.

94 4. That the laces were not ordinary baggage or wearing apparel for plaintiff, even if all her pretensions as to wealth and rank be admitted, and therefore the verdict should be for defendant.

5. That the evidence shows that the plaintiff carried with her on defendant's railroad the laces alleged to have been lost for transportation only, and they formed no portion of her wearing apparel for the purpose of her journey, and their presence is not excused by any anticipated use of them, and therefore the verdict should be for the defendant.

6. That plaintiff cannot recover for any articles except such as she had the right in law to demand to be carried, and for refusing to carry which defendant should be liable to an indictment, or to an action for damages, and these laces are not such; wherefore the jury should render their verdict for defendant.

95 7. That there is no evidence sufficient to justify submitting the question to the jury of any negligence on the part of the defendants which in any degree contributed to the plaintiff's loss, and the jury should render their verdict for the defendants.

8. That the plaintiff was guilty of negligence, which contributed to her loss, and the jury should render their verdict for the de endants.

9. Where the evidence is uncontradicted, as here, the court should pass upon the questions and not leave them to the jury, and should instruct the jury to find for the defendant.

10. That the plaintiff, being a married woman, is not entitled to maintain this action.

The court refused to give either of the instructions prayed for, and counsel for the defendants then and there separately excepted to the refusal as to each request.

96 Counsel for defendants then called as a witness in their behalf George H. Diehl, to show how the plaintiff and Weber were registered on the ship's return-book of passengers, when arriving here by the Westphalia.

Counsel for plaintiff objected to the same. The court sustained the objection, and counsel for defendant then and there excepted to such ruling.

Counsel for defendant then called as a witness in their behalf Timothy D. Pelton, who, having been duly sworn, testified, on his direct examin-

ation, that in 1870 he resided in the house with the plaintiff, in 23d street; that at one time he occupied the relation of counsel to her, but they still continued in the house after that relation ceased.

Q. After that relation ceased, do you remember plaintiff's dancing a Tartar dance in the house that was talked of?

(Objected to; excluded; exception.)

Q. Will you state what you know of the manners and doings of this plaintiff in that house, so far as you are at liberty to do it with respect to your professional relations, either before they were formed or after they ceased?

(Objected to; excluded; exception.)

Counsel for defendant proposed to show by this witness that the conduct of this plaintiff was such as to impress itself upon him that
97 she was a little out of her head, a little unbalanced, queer; that she was strange; and this testimony is offered because it goes to the question of her credibility, and when she undertakes to tell a thing how much credence is to be attached to it.

The court excluded the offer, and counsel for defendant then and there excepted to such ruling.

Counsel for defendants then called as a witness in their behalf Elizabeth McIntyre, who, having been duly sworn, testified that she lived in M'r's Horn's house at the time plaintiff was there—all the time; that the plaintiff was known by the name of Maluta, and occupied at first the front room on the fourth floor, and afterwards a room down stairs; that witness was frequently in her room.

Q. State what you know, from your observation, of the conduct of this plaintiff in the house.

(Counsel for plaintiff objected. The court sustained the objection, and counsel for defendant then and there excepted to such ruling.)

Q. What impression did your knowledge of M'r's Maluta leave upon your mind as to her mental condition?

(Counsel for plaintiff objected to the same. The court sustained
98 the objection, and counsel for defendants then and there excepted to such ruling.)

Defendant's counsel proposed to show by this witness that plaintiff was taken with a spasm on one occasion in the kitchen, and had to be carried up stairs, hallooing and screaming; that M'r's Horn had to call a servant to help to carry her up stairs; that she drank pretty freely; that she used to sit up nearly all night playing cards and drinking wine with Weber; that she would go round the house and would go into the parlor and sit upon the sofa by the hour in a half-dressed condition, on the ground that such acts affected her credibility as a witness, and as tending to show an unbalanced mind.

The court excluded each of said offers, and counsel for defendant then and there separately excepted to the ruling of the court as to each offer.

Counsel for defendants then called as a witness in their behalf John B. Stevenson, who, having been duly sworn, testified that he resided at M'r's Horn's house during the months of November, December,
99 and possibly part of January, 1869, and knew the plaintiff while there.

Counsel for defendants asks the same questions, and offers to show by this witness the same facts offered to be shown by M'r's McIntyre, the last preceding witness, as to acts of plaintiff and her character, and for the same reasons.

The court excluded the offer, and counsel for defendants then and there excepted separately to the refusal as to each offer.

Counsel for defendants then called as witness in their behalf Albert P. Pond, who, having been duly sworn, testified that he is and was in November, 1869, clerk of the Delevan House, Albany; that plaintiff and Weber came to the Delevan House, Albany, on November 2d, 1869; that Weber registered his name only as E. Weber, S't Petersburgh, and the witness learning that he was accompanied by a lady added the words "and lady;" that they stayed two days, and occupied communicating rooms; that they returned on Sunday, November 7, 1869; that Weber then entered their names as follows: "E. Weber,
100 S't Petersburgh," "Madame de Maluta Fralaff, S't Petersburgh." They stayed there till the afternoon of the next day and occupied the same rooms as before.

The place where the baggage that was not carried to the rooms was put in the hotel at the Delevan House in November, 1869, was in the corner of the hall, and the surroundings were a marble floor; on the one side is the segar stand; on the other the porter's private room. It is separated from the hall that runs past the office by the partition of the segar stand, which is perhaps as much as seven feet high. So that the segar stand lies between the office and the baggage itself. The baggage is not in view of the office. You do not see the baggage from the office.

Counsel for defendants then called as a witness in their behalf Joseph H. Kelly, who, having been duly sworn, testified as follows:

I am deputy U. S. marshall for the northern district in this State. In November, 1869, was a detective of the Albany capitol police force, and had been for 10 or 12 years. I remember being called in by
101 M'r's Fraloff on the Sabbath day after she returned from Niagara, she saying she had lost some laces, and showed me a hand-satchel of jewelry about 12 inches long by eight inches high and 4 or 6 inches thick. I asked her why did she not carry her laces in her satchel, as they were more valuable than jewelry. She said she carried them in her trunk.

Q. Did she give you to understand that her laces would go into that satchel?

(Objected to; excluded; exception by def't.)

Q. What was the impression left upon your mind, drawn from your acquaintance with mankind and your professional exertions, as to the mental condition of this woman?

(Objected to; excluded; exception by def't.)

Def't's counsel further proposed to show by this witness that he went with plaintiff and examined some other baggage than that from which the laces had been taken, and from which other baggage she thought things had been lost at the Union depot, Albany, and found
102 them there; that in his opinion the trunk was packed as full as it could possibly be, and that from what he saw he felt sure nothing had been lost.

(Excluded. Exception by def't.)

Testimony of M'r Cole, offered by def't's counsel, to the effect that he was conductor of the train from Albany to Rochester in which pl'ff was Nov. 4th, 1869. That he saw nothing unusual in the baggage-car; that Sevallow was the baggage-master on that trip; that he has known him many years and his reputation, which is good.

(Excluded. Exception by def't.)

Counsel for defendant then called Joseph P. Morrow and Henry C. Munger; each of whom, having been duly sworn, testified as to the cus-

ation, that in 1870 he resided in the house with the plaintiff, in 23d street; that at one time he occupied the relation of counsel to her, but they still continued in the house after that relation ceased.

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Counsel for defendants then called as witness in their behalf Albert P. Pond, who, having been duly sworn, testified that he is and was in November, 1869, clerk of the Delevan House, Albany; that plaintiff and Weber came to the Delevan House, Albany, on November 2d, 1869; that Weber registered his name only as E. Weber, S't Petersburgh, and the witness learning that he was accompanied by a lady added the words "and lady;" that they stayed two days, and occupied communicating rooms; that they returned on Sunday, November 7, 1869; that Weber then entered their names as follows: "E. Weber,
100 S't Petersburgh," "Madame de Maluta Fralaff, S't Petersburgh." They stayed there till the afternoon of the next day and occupied the same rooms as before.

The place where the baggage that was not carried to the rooms was put in the hotel at the Delevan House in November, 1869, was in the corner of the hall, and the surroundings were a marble floor; on the one side is the segar stand; on the other the porter's private room. It is separated from the hall that runs past the office by the partition of the segar stand, which is perhaps as much as seven feet high. So that the segar stand lies between the office and the baggage itself. The baggage is not in view of the office. You do not see the baggage from the office.

Counsel for defendants then called as a witness in their behalf Joseph H. Kelly, who, having been duly sworn, testified as follows:

I am deputy U. S. marshall for the northern district in this State. In November, 1869, was a detective of the Albany capitol police force, and had been for 10 or 12 years. I remember being called in by
101 M'r's Fraloff on the Sabbath day after she returned from Niagara, she saying she had lost some laces. and showed me a hand-satchel of jewelry about 12 inches long by eight inches high and 4 or 6 inches thick. I asked her why did she not carry her laces in her satchel, as they were more valuable than jewelry. She said she carried them in her trunk.

Q. Did she give you to understand that her laces would go into that satchel?

(Objected to; excluded; exception by def't.)

Q. What was the impression left upon your mind, drawn from your acquaintance with mankind and your professional exertions, as to the mental condition of this woman?

(Objected to; excluded; exception by def't.)

Def't's counsel further proposed to show by this witness that he went with plaintiff and examined some other baggage than that from which the laces had been taken, and from which other baggage she thought things had been lost at the Union depot, Albany, and found
102 them there; that in his opinion the trunk was packed as full as it could possibly be, and that from what he saw he felt sure nothing had been lost.

(Excluded. Exception by def't.)

Testimony of M'r Cole, offered by def't's counsel, to the effect that he was conductor of the train from Albany to Rochester in which pl'ff was Nov. 4th, 1869. That he saw nothing unusual in the baggage-car; that Sevallow was the baggage-master on that trip; that he has known him many years and his reputation, which is good.

(Excluded. Exception by def't.)

Counsel for defendant then called Joseph P. Morrow and Henry C. Munger; each of whom, having been duly sworn, testified as to the cus-

tom and course of business of the defendant at Albany in the reception and treatment of baggage.

Counsel for the defendant then gave testimony by several witnesses tending to show that the trunk was safely cared for from the time it came into defendant's possession until delivered to plaintiff.

Counsel for defendants then called as a witness Robert F. West-
103 cott, who, having been duly sworn, testified as follows:

I have been engaged in the transportation of baggage in New York for twenty-five years.

Q. From your knowledge of the value of baggage, please state the usual value of a single piece of baggage carried by a passenger.

(Objected to. Counsel for defendants offers to show that the average value will not exceed $200 a trunk. The court excluded the testimony, and counsel for defendants then and there excepted to such ruling.)

Q. Is it true that a great many passengers do not carry any baggage at all?

(Objected to. The court sustained the objection, and counsel for defendants then and there excepted to such rulings.)

Q. You have had claims for lost baggage made upon you, have you not?

A. Yes, sir.

Q. Did you ever have a claim made by ladies going to Niagara, Saratoga, or anywhere else for a loss of laces of the description which are in this case?

(Objected to. The court sustained the objection, and counsel
104 for defendants then and there excepted to such ruling.)

Q. In regard to the general security or insecurity of baggage as it is transported by railroads, what is its condition?

(Objected to. The court sustained the objection, and counsel for defendants then and there excepted to such ruling.)

Q. Do you remember the claim for this lace as it was originally made in 1869? Do you remember the time?

A. Yes, sir; I recollect the circumstance.

Q. You remember hearing about it?

A. Yes, sir.

Q. To your knowledge, was it or not a subject of general knowledge by the employees of the defendant?

A. I think it was; yes.

Q. Was it also generally known that rewards were offered, and no questions asked?

(Objected to. The court sustained the objection, and counsel for defendants then and there excepted to such ruling.)

Defendants' counsel offers to show by this witness that coupon tickets
were sold at Albany in November, 1869, for places beyond the
105 State of New York, as bearing upon the intention of the plaintiff in regard to her trip, and her notice to this defendant as to what her intended trip was.

(The court excluded the offered evidence, and counsel for defendants then and there excepted to such ruling.)

Counsel for defendants then called as a witness George Ashley, whose testimony tended to show that he was in the United States sub-treasury here as chief of the coin division; have been in that position over two years.

Q. Will you tell me how much a bag of $5,000 gold-coin weighs?

(Objected to. Objection sustained.)

Defendants' counsel proposed to show the weight and bulk both of

gold and currency, and then proposed to show how much less weight and less bulk these lost laces occupied in this trunk than their value in either paper money or metal money would have occupied, and that they would occupy a very great deal less space, as a question bearing upon the liability of the carrier. Also, that a bag of gold of $5,000 will weigh
18½ pounds, and occupies, with the bag, 7½ inches in length, 6
106 inches in width, 2½ inches in depth.

(The court excluded the offered evidence, and counsel for defendant then and there separately excepted to such ruling as to each part of such offered testimony.)

Q. You are familiar with the weight and bulk of currency—United States notes?

A. Yes.

Defendants' counsel proposed to show that a package of 1,000 one-dollar United States notes would be 7 inches in length, 3¼ in width, and 4½ inches in depth.

(Same objection, ruling, and exception.)

Counsel for defendants then called as a witness Alexander T. Stewart, whose testimony tended to show that he was a merchant in the city of New York, and had dealt in laces, and had visited the different lace markets of Europe; that he was familiar with the market value of lace here; that antique laces, such as described by the plaintiff as having
been lost, would have a very limited market value, if any value,
107 in this country, and that his impression was that the sale was also very limited in Europe; that they were not much dealt in, but their ownership was confined to old families abroad; that there is a difference in the value of laces of the same name, depending upon their fineness, &c.; that, in his opinion, modern laces are finer than antique laces; that point d'Alençon was the most valuable lace he had ever seen, and the finest piece he ever saw of that was worth, in 1869, from $250 to $300 per yard; that piece was about 17 or 18 inches in width; that such piece of lace was owned by A. T. Stewart & Co.; that he knew very little about antique laces, and dealt mostly in modern laces.

108 Memorandum of weight and measurement of the trunk of the plaintiff, put in evidence and marked "Deft's Exhibit 1."

*Measurements and weight of trunk.*

| | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1st tray-top; | length, | 2 | f't | $10\frac{1}{8}$ | in.; | width, | 1 | f't | 7 | in.; | depth, | $4\frac{1}{2}$ in. |
| 2d | " | " | 2 | " | $9\frac{9}{16}$ | " | " | 1 | " | $6\frac{3}{4}$ | " | " | $4\frac{1}{8}$ " |
| 3d | " | " | 2 | " | $9\frac{5}{16}$ | " | " | 1 | " | $6\frac{3}{4}$ | " | " | $4\frac{1}{8}$ " |
| 4th | " | " | 2 | " | $9\frac{7}{16}$ | " | " | 1 | " | $6\frac{13}{16}$ | " | " | 4 " |

*Trunk.*—Length, 2 f't 11 in.; width, 1 f't $8\frac{1}{4}$ in.; depth, 1 f't $7\frac{3}{4}$ inches Trunk weight, 64 lbs.

The order of Judge N. Shipman refusing to suppress the plaintiff's deposition, dated Dec. 15, 1874, was here read in evidence, and defendant excepts.

Defendant rests.

Plaintiff resumes.

Waldeman Bodisco was recalled by counsel for plaintiff to translate the French answers in the commission to take the testimony of Michel Simeon de Fraloff, and plaintiff's counsel offered to read said deposition, it being annexed to the same commission as that of Peter Wyckoffe.

Counsel for the defendant objected to the same on the various grounds heretofore stated as to the deposition of Peter Wyckoffe, and on further ground that it was a part of the plaintiff's original case and counsel should not be allowed to re-open the case now.

109 The court overruled each objection, and counsel for defendant then and there excepted to each of such rulings.

Counsel for plaintiff then read from the deposition the several questions asked said Fraloff, and the witness Bodisco translated the answers.

This deposition tended to show that the plaintiff belonged by her birth to one of the first noble families of Russia, and by her relations to the highest of the distinguished circles of nobility, and had estates, and was his wife, and she and he belonged to the old nobility; and to the separate questions in regard to each of such answers the counsel for defendant objected, and being overruled by the court duly and separately excepted.

The commission is signed by both of the same persons above named, to whom it is addressed in the alternative.

Plaintiff again rests.

Counsel for defendants thereupon requested the court to direct the jury to find a verdict for the defendant upon the same grounds as stated when plaintiff first rested, and also upon the whole case.

110 The court refused, and defendant's counsel duly and separately excepted on each ground so heretofore stated.

The court then charged the jury in substance, among other things, as follows:

"There is no dispute upon the evidence that the plaintiff entrusted certain baggage to the defendant to be carried for her as a passenger, at or about the time mentioned in the declaration, and that at that time the defendant was a common carrier of passengers and, as such, of their reasonable baggage; and that plaintiff was carried by defendant as a passenger from Albany to Niagara Falls; and there is no dispute upon the evidence that if the laces were in plaintiff's trunk when delivered to def't at Albany, they were not delivered to her at Niagara Falls, and were therefore lost or abstracted on the way.

"These facts being undisputed, the case presents but two general questions upon which plaintiff's right to recover depends: first, were the laces in controversy in the plaintiff's trunk when it was delivered to the defendant at Albany; and, second, if you find the first

111 question in favor of plaintiff, were the laces in controversy thus delivered reasonable baggage within the rules of law."

The court then adverted to the evidence bearing upon the question whether the laces were delivered to the defendant, and left it to the jury to determine, instructing them that upon this question the burden of proof was on the plaintiff.

The court also instructed the jury that the defendant was liable for the loss of baggage whether it was stolen or abstracted by its own employees or by others, and if the jury should upon the evidence adopt the theory that the laces were stolen by Weber, the plaintiff's attendant, the defendant would still be liable in the absence of any evidence in the case that they were taken by him under such circumstances as would authorize the employees of the defendant to suppose that he was acting for the plaintiff in doing so.

The court then proceeded substantially as follows:

"If you find in favor of the plaintiff upon the first general question to which I have adverted, you reach the second, whether the articles

112 in question, or any of them, were baggage within the rules of law. Now this is a mixed question of law and fact. Every traveler is entitled to provide for the exigencies of the journey in the way of his baggage, and is not limited to absolute essentials, to comfort or convenience, but is permitted to carry such articles as are usually carried by persons traveling for their comfort, convenience, and gratification upon journeys.

"While on the one hand the carrier is not responsible for the safety of any such articles as the traveler may choose to denominate as his baggage, on the other hand the carrier is responsible for such as the traveler would ordinarily deem reasonable for the journey. The question is what are reasonable and usual articles for the particular traveler whose case is under consideration, in view of the wants and habits of life of the traveler, and in view of the character of the journey, its aim, and various contingencies. You are to place yourselves, then, in the position of this plaintiff, taking into consideration the ordinary habits, necessities, conveniences, and pleasures of traveling, and determine, with reference to her means and tastes and the nature of the journey she was pur-

113 suing, what were or were not reasonable articles for her to carry with her as her baggage.

"Now, carriers are presumed to be cognizant, as other people are, of what is usually carried by travelers, and to know that no strict rules can be laid down, as the fancied wants of some are as real to them as the substantial necessities to others; but inasmuch as carriers undertake to transport all kinds of people on their railroads, they impliedly contract with those they carry safely to keep for them such articles as are customarily carried for the convenience of persons who travel.

"The responsibility of carriers cannot be maintained to the extent of making them responsible for such unusual articles as the exceptional fancies, habits, or idiosyncracies of some particular individual may prompt that individual to carry. That liability is limited to responsibility for such articles as it is customary or reasonable for travelers of the same class and tastes in general, to take for such journeys as the one which is the subject of enquiry, but it does not extend to those

114 which the caprice of a particular traveler, whose case you may be considering, may lead that traveler to take.

"Now, applying these propositions to the facts in this case, in view of the plaintiff's position in life and the nature of her journey, can you say that the officers of the defendants had reason to suppose, if they had been informed of her position and the nature of her journey, that she was entrusting to their care articles of such rare and immense value as it is now claimed in fact she did?

"Here was a lady many thousands of miles from her home, among strangers, speaking an unknown tongue, traveling for health and partly for recreation, under circumstances in which it is not reasonable to suppose that she could have expected to enjoy any very great extent of social intercourse with those with whom she might be brought in contact.

"Now, the question is for you to determine, as best you may, whether it is customary for such a lady, under such circumstances, to carry with her articles of the character of those which are in controversy here.

"I have thus far assumed, gentlemen, that the plaintiff was what she represented herself to be; and it is for you to determine what her real status was."

115 The court then adverted to the evidence in the case respecting the position and rank in life of the plaintiff, the object of her visit

to this country, and the purpose of the particular journey; and then proceeded substantially as follows:

"Now, gentlemen, if you find on the first question of fact to which I have called your attention, that these laces were in the trunk at the time it was delivered to the custody of the defendant, and if you find that all of them or a portion of them were her reasonable baggage within the rules which I have defined, then you come to the question of damages, and in regard to the rules which should govern you upon that question I shall give a very few instructions.

"The principle of valuation where an action is brought against a carrier for the loss of baggage entrusted to him, is the value of the articles lost at the place of destination; to which value the jury have the right to add interest to the time of the trial, if they see fit. The value means market-value for the purposes of actions of this kind, not the fanciful estimate that the owner may place upon his property, because of
116 its peculiar desirability to him, but the market-value; and in cases like this the difficulty is in ascertaining what is the market-value. There may be no sale or demand for the article at a particular place, but it would not follow that there was no market for it; neither is it fair to call that the market-value which an article might be sold for under exceptional circumstances.

"The rule to be adopted in this case is the value of the article at the place of destination. Or if there is no market-value there, then at the nearest place thereto where there is a market-value for the commodity; and then that value is to be found by ascertaining what the article would bring if put upon the market for sale in the ordinary conditions of the market in reference to the particular commodity offered. It is by these instructions that you are to determine the value of the laces at the time of their alleged loss. Now, gentlemen, you may come to the conclusion upon one theory of this case, that while all the articles in question were not reasonable ones to be considered as baggage, yet that some portion of them were. In that case you are to allow her the
117 value of such as you conclude she was entitled to carry.

"Now I will enumerate to you from the list which has been handed to me the various articles which it is claimed she had in this trunk in question: Three velvet robes, linen clothes, collars, pelerines, sleeves, corsage, morning dress. One velvet robe had gold buttons with diamonds, and another one gold buttons with garnets. Petticoats, morning dresses, gloves, pocket-handkerchiefs, camisols, stockings, fur cloak, wool mantilla, one night-dress.

"These were in the first compartment of the trunk, as I understand it. In the second compartment: One black-velvet dress, two black-silk dresses; third compartment, one silk-velvet dress; fourth compartment, one lilac-velvet dress, trimmed with ermine; fifth compartment, one package of lace, laces in pieces, soiled collars, sleeves, laces for the head, handkerchiefs trimmed with lace, and of the dresses mentioned in the other compartments one had gold and diamond buttons, and in addition to these things there were other linens and the laces
118 which it is claimed were lost. That is what was in the trunk, as she says, before it arrived broken at Niagara Falls. In addition to this she carried a small trunk, a hat-box, four satchels, *of* bag of jewelry, and a cage of birds. Now, if you should find that any portion of this which you may find was lost or stolen was reasonable and proper for her to carry, and all was not, then you will allow her for the value of that portion.

"And in this connection, if you find that plaintiff delivered baggage,

aside from the laces in question, to the defendant, which defendant carried and which was sufficient for the plaintiff as reasonable baggage within the rules I have laid down, then she is not entitled to recover.

"And there is another suggestion which perhaps should be in this case in view of some of the evidence which has been offered. If you should come to the conclusion that the lady was carrying these laces with her upon her travels, for the purpose of having them safely kept and stored by the various railroad companies and carriers who might transport them, and the various hotel-keepers with whom she might stop, if that was her object, rather than that of using them as
119 occasion might require for her gratification, comfort, or convenience, why, then, the defendant is not liable. The defendant is a common carrier of the baggage as well as of the traveller himself, and as such is responsible as insurer for everything which is entrusted to it which can property be called baggage, unless it brings itself within the exemption, which it is not claimed exists in this case, of loss by the act of God or by the public enemy.

"There is one instruction which I neglected to give you to which my attention has been called. It is this: In looking at the character of the journey of this lady for the purpose of ascertaining whether this was reasonable baggage or not, you are not confined simply to the journey from Albany to Niagara Falls, but you are to take into consideration the whole journey upon which she had started, which she was contemplating and intending to take in this country."

The def't's counsel thereupon duly excepted to the said charge, as follows:

Defendant's exceptions to the following portions of the charge:

120 1st. To that which says that an adroit or expert thief might have taken them, upon an opportunity which may have been offered to him by defendant to do so, inasmuch as there is no evidence of anything of the sort, but the evidence is to the contrary.

2nd. To that which says that the defendant is liable if Weber took the laces after they were entrusted to the defendant, on the ground that Weber was the plaintiff's agent in the matter.

3rd. To that which says that the question of the amount of baggage for which defendant is to be deemed liable is to be determined by the rank, means, and tastes, &c., of the plaintiff; and that the fancied wants of some are as real as the substantial wants of others, there having been no proof as to what is the ordinary baggage carried by other ladies of her rank, distinction, and taste.

4th. To that which says that Weber may have entered the different names to suit his own whim.

5th. To the exclusion of testimony as to particular acts of plaint-
121 iff as affecting the question of her credibility.

6th. To the court's limiting the amount of baggage to be taken by the word "reasonable" and not by the word, "ordinary baggage."

7th. To that portion which holds that the defendant is liable for baggage as insurer, except as against the act of God and the public enemies.

8th. To that portion which directed that the jury might consider the whole journey plaintiff intended taking in this country.

9th. To that which says def't admits itself to be a carrier of passengers and their "reasonable baggage."

10th. To that which treats of defendant's officers having reason to suppose that the baggage had articles of such great value.

11th. That the jury might allow for a portion of the laces claimed to be lost, although they should think the whole of them to be unreasonable in amount.

12th. To the instructions as to ascertaining the value of the laces.

13th. That the question of fraud is not in the case.

122 14th. That there is no dispute upon the evidence that if the laces were in the trunk when delivered to defendant at Albany they were not delivered to her at Niagara Falls.

A JUROR. I should like to enquire whether any rulings or decisions have been made in the case with reference to the proper notice as to the unusual amount or value of the baggage carried, or its being a fraud not to give such notice.

The COURT. I have not alluded to that question because I have considered that question not in this case. If a traveller by any fraud imposes upon the carrier property of value and of a kind which the carrier ought not to be required to take, why the carrier is absolved from all responsibility as a carrier for that baggage; but the simple question here is, whether the baggage which the plaintiff actually entrusted to the defendant was reasonable baggage. If it was, there was no fraud in asking the defendant to carry it; and if you find that it was not, that is the end of the case.

(To which def't's counsel duly excepted.)

123 In estimating the damages, if the jury find def't liable, you are not confined to the evidence which has been given directly to show the market value of these particular laces, but you may consider all the facts in regard to the laces disclosed by the evidence and determine upon the general evidence what the market value was.

(To which def't's counsel duly excepted.)

Thereupon the counsel for the defendant requested the court to charge the jury as follows:

1. That the jury and each of them must be satisfied that the laces in question were delivered to the defendant at Albany, and not delivered to plaintiff at Niagara Falls, before they can find a verdict for the plaintiff.

2. That the plaintiff, if entitled to recover, is only entitled to recover the value of her ordinary baggage.

3. That if the laces in question are not satisfactorily shown by the evidence to have been carried by the plaintiff on the journey from

124 Albany to Niagara Falls (if so carried or delivered to be carried) for the purpose of wearing on said journey or at its termination, the defendants are not liable.

4. That if the jury believes the laces in question were not ordinary baggage, the defendants are not liable.

5. The laces which are the subject of this action were not ordinary and usual baggage of plaintiff for the purposes of her journey, wherefore she cannot recover.

5½. That if the jury find for the plaintiff they can only find the market value of the laces in question.

6. That there is no evidence of market value in the case.

7. That in estimating the market value the jury must limit themselves to evidence of market value, and must exclude conjection or speculation as to what the laces in question ought to be worth as compared with laces of different size or material or style, the market value of which has been proved.

8. That if the jury believe that there was fraud or imposition on the

part of the plaintiff in not disclosing to the defendants the alleged
125 high value of the laces in question, the defendants are not liable.

9. The plaintiff was guilty of fraud in failing to disclose, whether intentionally or not, the character of her baggage as to laces, wherefore she cannot recover.

10. In order to make the defendant as a common carrier liable for these laces, in view of the evidences as to their description, quantity and quality, and the claim of the plaintiff as to their value, it being admitted that the defendant had no notice whatever that the laces were in the trunk, or that the trunk contained anything of extraordinary or unusual character or value, or anything but ordinary baggage, common justice and the law required that the defendant should be informed of the nature and importance of its charge so that it might take the necessary precautions for the safety of the laces and for its own protection, which, it is admitted, was not done, wherefore the defendant, under the evidence, is not liable for the loss of the laces.

11. Presenting the trunk to defendant and procuring the defendant to receive and check it as baggage, without notice to it, and it having
126 no knowledge or notice as to the laces or the extraordinary character, extent, or value of them, was a virtual concealment of the laces, their extraordinary character, extent, and value, and was unfairness calculated to deceive the defendant, and the plaintiff is not entitled to recover.

12. That if the jury believe that the laces in question were not the ordinary baggage of the plaintiff, then it was the duty of the plaintiff to have disclosed to the defendant the fact that laces of the alleged value of the laces in question were contained in the trunk.

13. That in determining whether the laces in question were part of the ordinary baggage of the plaintiff the jury must take into consideration the extent of the other effects carried by the defendant without compensation other than the same fare which she would have paid if without baggage.

14. That in determining whether the laces in question were the plaintiff's ordinary baggage the jury must consider whether the plaintiff
127 would, on her journey or at its termination, have used for personal wear or adornment the laces in question.

15. If the jury find that defendant delivered plaintiff at Niagara Falls a reasonable amount of ordinary and usual baggage and wearing apparel, their verdict will be for the defendant.

16. That if the jury find that the laces alleged as lost were of an extraordinary character and value and unusual in quantity, their verdict will be for the defendant.

17. As no declaration of the unusual value of these laces was made to defendant, and their unusual value, as well as the alleged quality and rank of plaintiff, were concealed from defendant, the jury are not to be influenced in arriving at their decision by consideration of the rank or quality of the plaintiff, but are to consider her as she by her conduct represented herself to be, as an ordinary traveler to whom defendant owed no greater duty than to any respectable lady passenger.

18. That it is the duty of plaintiff to convince the jury and each of them that all the laces alleged to be lost and of the description
128 asserted by the plaintiff were actually in the trunk when delivered to defendants at Albany, and if the evidence is not satisfactory on this point, or if the jury are in doubt about it, they should give the defendant the benefit of that doubt and return a verdict for defendant.

19. In determining the foregoing question, the jury are to consider the

fact that the trunk was originally packed at a distance of 150 miles from the place where it was delivered to defendant; that the testimony as to what quantity of laces were packed, and the parts of the trunk where packed, is conflicting; that Weber, according to plaintiff's testimony, went to the trunk at Albany at least one time more than he testified to himself; that he, by going to all the great lace stores in Paris, had become familiar with the great value of these laces, and the fact that these laces were wrapped up and covered so that they could not be seen at a hasty glance, and that diamond and gold buttons—things generally prized by thieves—were not taken, besides the other testimony bearing upon this subject.

129 20. If the jury find that plaintiff concealed from defendant the extraordinary character and value of the laces, and procured defendant to receive and check the trunk as ordinary baggage, then she committed a fraud upon defendant, whether intended or not, and she cannot recover.

21. That the evidence shows that defendant received no compensation for assuming the risk of transporting these laces, the law justly confining the compensation that was paid to the transportation of the person and her ordinary baggage.

22. That the jury, in considering the nature and object of her trip, are to consider the season of the year in which it was made, the fact that she had no coupon-tickets for a further western trip beyond Niagara; that the leading hotels at that watering-place were closed; that she has shown no expectation of wearing these laces at any place where she even conjectured she might go, and unless she had occasion to wear them, and anticipated that occasion, they were not her ordinary baggage in the proper sense of the words, and she cannot recover.

130 23. If the plaintiff has not shown to the satisfaction of the jury, and each of them, a reasonable expectation of wearing the laces at a near time to her taking her trip from Albany, she cannot recover.

24. If the jury believe that plaintiff was warned against traveling with such rare and valuable laces before she left New York, and that, in view of this warning, she did not act with reasonable prudence in persisting in carrying her laces with her, she cannot recover.

26. If the jury believe that plaintiff left behind her her usual and ordinary baggage and selected her most expensive and valuable articles to take with her to Niagara, their verdict will be for defendant.

27. The jury were not to infer from the fact that the court denied the defendant's motion to instruct the jury to find for the defendant that the court is of opinion that the plaintiff ought to recover.

28. If on any one of these propositions each member of the jury is not satisfied, they cannot render a verdict in the case.

131 29. That the contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience.

30. If the jury believe that the plaintiff, by her method of treating the trunk in question, led defendant to believe that it contained no articles of unusual valuse, then she cannot recover.

31. If the jury believe that, by the plaintiff's conduct, the defendant was prevented from charging and receiving a just compensation for transporting her laces, or was deprived of the opportunity of protecting itself against loss in respect to them, their verdict will be for defendant.

32. If the jury believe that the trunk was insufficient and inadequate

for the safe transportation of such laces, their verdict will be for the defendant.

33. That under no circumstances can the plaintiff recover for the value of any article which she had not the right to demand should
132 be carried if the value had been declared.

34. The plaintiff cannot recover for the value of any article for the refusing to carry which defendant would not be liable to an indictment or to an action for damages.

35. That these laces were not such an article.

36. That unless the plaintiff has proved to the satisfaction of the jury, and each of them, that the defendant has been guilty of negligence, she cannot recover.

37. That if the jury believe that the plaintiff herself was guilty of negligence which contributed to the loss she cannot recover, and in determining this question they may consider all the circumstances of the packing the trunk at New York, the manner in which it was left among the hotel-baggage at the Delevan House for two nights and a day and a half, the number of times it was opened there, the character of the trunk itself, and the other evidence bearing on the question.

38. If the jury believe that plaintiff, in her testimony, has misrepresented either the quantity, character, or value of the laces, she cannot recover.

133 39. If the jury believe that the locks of the trunk were pulled out by the ordinary handling and shaking of the baggage and the laces were lost in consequence without fault on part of the defendant, their verdict will be for defendant.

40. If the jury believe that the trunk, when delivered to plaintiff at Niagara Falls, contained a reasonable amount of laces for the plaintiff to carry with her on this trip, their verdict will be for defendant.

41. If the jury find for the plaintiff, they shall assess the damage for such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and amusement or protection, having regard to the object and length of the journey.

42. Even if the jury think that the laces were lost, as claimed by plaintiff, yet if they are unable to fix the market value of these laces, they should find a nominal verdict for the plaintiff.

The court declined to charge as requested otherwise than as heretofore charged, and thereupon defendant's counsel duly and severally excepted to such refusal in respect to each of the requests above made.

134 The jury returned a verdict for plaintiff of $10,000, without interest.

135 And because none of the said exceptions so offered and made to the opinions and decisions of the said circuit judge do appear upon the record of the said trial; therefore, on the prayer of the said defendants, by their said counsel, the said judge hath to this bill of exceptions set his seal, according to the statute, this 22nd day of July, one thousand eight hundred and seventy-six.

WM J. WALLACE,
*U. S. District Judge.*

(Endorsed:) U. S. circuit court, southern district of New York. Olga de M. Fraloff vs. The N. Y. Central and Hudson R. R. Co. Bill of exceptions. Elliott F. Shepard, attorney and counsellor at law, Tribune building, New York City, att'y for def't & app'l't. Filed July 25, 1876.

136 *Assignment of errors.*

(Which will be more fully set forth, as directed by Rule 21 of the Supreme Court.)

Supreme Court of the United States.

THE NEW YORK CENTRAL AND HUDSON RIVER Railroad Company, plaintiff in error,
*vs.*
OLGA DE MALUTA FRALOFF, DEFENDANT IN error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-six.

Afterward, to wit, on the second Monday of October, in said term, before the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, comes the said The New York Central and Hudson River Railroad Company, by Elliot F. Shepard, its attorney, and says that by the record aforesaid there is error in the several rulings of the court upon the rejection or admission of testimony to which exceptions have been taken, also that there was error in the refusal of the court to direct a verdict for the plaintiff in error as thereto requested, and in its charges to and refusals to charge
137 the jury otherwise than as requested, to all which exceptions have been taken; whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error and against the said defendant in error, and the said plaintiff in error prays that the judgment aforesaid for the errors aforesaid and other errors aforesaid, and other errors in the record and proceedings aforesaid, as the same appears more fully therein may be reversed, annulled, and altogether held for nothing, and that the plaintiff in error may be restored to those things which it has lost by reason of said judgment.

ELLIOT F. SHEPARD,
*Attorney and Counsel for Plaintiff in Error.*

(Endorsed:) U. S. Supreme Court. The New York Central & Hudson River Railroad Company, pl'iff in error, vs. Olga de Maluta Fraloff defendant in error. Assignment of errors. Elliott F. Shepard, attorneys & counsellor at law, Tribune building, New York City, attorney and counsel for pl'ff in error. Filed Aug. 2d, 1876.

*Bond for costs.*

138 Circuit court of the United States of America for the southern district of New York, in the second circuit.

THE NEW YORK CENTRAL AND HUDSON RIVER Railroad Company, plaintiff in error,
*vs.*
OLGA DE MALUTA FRALOFF, DEFENDENT IN error.

Know all men by these presents that we, William H. Vanderbilt, of No. 459 Fifth avenue, New York City, and Cornelius Vanderbiit, j'r, of No. 72 East 34th street, New York City, are held and firmly bound unto the above-named Olga De Maluta Fraloff in the sum of fifteen thousand dollars, to be paid to the said Olga De Maluta Fraloff, for the pay-

ment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas the above-named The New York Central and Hudson River Railroad Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named The New York Central & Hudson River Railroad Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

W. H. VANDERBILT. [L. S.]
C. VANDERBILT, J'R. [L. S.]

Sealed and delivered and taken and acknowledged this 20th day of May, 1875, before me,

[L. S.] JOSEPH GUTMAN, J'R,
*United States Commissioner, S. D. of N. Y.*

139 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

William H. Vanderbilt and Cornelius Vanderbilt, j'r, being duly sworn, do depose and say, and each for himself severally says, that he is worth the sum of thirty thousand dollars, over and above all his just debts and liabilities and property exempt by law from execution.

W. H. VANDERBILT.
C. VANDERBILT, J'R.

Sworn to this 20th day of May, A. D. 1875, before me,

[L. S.] JOSEPH GUTMAN, J'R,
*United States Commissioner, S. D. N. Y.*

(Indorsed:) Vol. , page . U. S. circuit court. The New York Central & Hudson River Railroad Company, pl'ff in error, vs. Olga de Maluta Fraloff, def't in error. Bond for costs on writ of error. Elliott F. Shepard, att'y for pl'ff in error.

I approve the within bond.
New York, May 20, 1875.

SAM'L BLATCHFORD.

Filed this 20 day of May, 1875.

140 United States Supreme Court.

THE NEW YORK CENTRAL AND HUDSON RIVER Railroad Company, plaintiff in error,
*against*
OLGA DE MALUTA FRALOFF, DEFENDANT IN error.

UNITED STATES OF AMERICA, *ss:*

To Olga de Maluta Fraloff, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second

Monday of October, 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The New York Central and Hudson River Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New
141 York this twentieth day of May, in the year of our Lord one thousand eight hundred and seventy-five.

SAM'L BLATCHFORD.

(Indorsed:) U. S. Supreme Court. The New York Central and Hudson River Railroad Company, plaintiff in error, against Olga de Maluta Fraloff, defendant in error. Citation. Elliott F. Shepard, attorney for plaintiff in error, 90 Broadway, New York.

Due service of a copy of the within citation is hereby admitted this 21st day of May, 1875.

PLATT & GERARD,
*Att'y for* Pl'ff *in Error.*

Filed May 21, 1875.

Supreme Court of the United States.

THE NEW YORK CENTRAL AND HUDSON RIVER Railroad Company, plaintiff in error,
*ag'st*
OLGA DE MALUTA FRALOFF, DEFENDANT IN error.

It is hereby stipulated between both parties hereto that the citation and writ of error herein shall stand and be in all respects of the same force and effect as if the same were made properly returnable the second Monday of October, 1876.

PLATT & GERARD,
*Att'ys for Olga de M. Fraloff, Defendant in Error.*
ELLIOTT F. SHEPARD,
*Att'y for N. Y. C. & H. R. R. R. Co., Plaintiff in Error.*

(Indorsed:) U. S. Supreme Court. The N. Y. Central & Hudson River R. R. Company, pl'ff in error, vs. Olga de M. Fraloff, def't in error. Stipulation as to writ of error & citation. Elliott F. Shepard, att'y for pl'ff in error, Tribune b'ld'g, New York.

(Indorsement on cover:) No. 509. The New York Central & Hudson River Railroad Company, plaintiff in error, vs. Olga De Maluta Fraloff. S. New York C. C. U. S. Filed 13th October, 1876.

# Supreme Court

OF THE UNITED STATES,

No. 803.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

*Plaintiff in Error,*

*vs.*

OLGA DE MALUTA FRALOFF.

In Error to the Circuit Court of the United States for the Southern District of New York.

# Brief for Plaintiff in Error.

ELLIOTT F. SHEPARD,

*Of Counsel for Plaintiff in Error,*

Tribune Building,

New York City.

NEW YORK:
AMERICAN BANK NOTE COMPANY, TYPE DEPARTMENT, 53 BROADWAY.

1879.

# U. S. Supreme Court.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,

*vs.*

OLGA DE MALUTA FRALOFF,
Defendant in Error.

No. 803.

**In Error to the Circuit Court of the United States for the Southern District of New York.**

## Brief for Plaintiff in Error.

### Abstract of the Case.

Action: Trespass on the case, for loss of a very small portion of defendant's so-called baggage, of fabulous value, while she was a passenger on plaintiff's railroad, Nov. 4, 1869.

The defendant below, is admitted by both parties to be a common carrier of passengers and freight for hire (fol. 74).

The case is most extraordinary.

According to the theory of the plaintiff below, she was descended from high ancient Tartar ancestry; was connected with the Princess Marie of Russia (fol. 51); was the first lady of her rank ever in the United States (fol. 32).

That she was an unmarried person (fol. 14); that she was the wife of Michel Maluta Fraloff, a colonel of the Russian Dragoons (fol. 32); that after having traveled through Europe, Asia and Africa, she came

to this country in September, 1869, with Mr. Webber (fol. 30), to see the "prairies, forests and birds of America" (fol. 35); not intending to seek society (fol. 35); and went with Webber, first to the Albemarle Hotel, in New York City, thence to Mrs. Horn's boarding-house, No. 229 West Twenty-third street (where she occupied a room in the fourth story); and where she was never called on by anybody; never attended meetings nor places of amusement; never went out, and had no other servant than Webber, whom she called "Henrietta," and "only a woman" (fol. 71), and, though sick had no physician (fol. 70).

That in November, 1869, she and Webber went together to the Delavan House, Albany, (where she and Webber occupied communicating rooms (fol. 89), and on the 4th of November took passage with Webber by defendant's railroad for Niagara Falls, arrived there in the middle of the night, found the lock on one of her trunks loosened, and claimed that she had lost by robbery on the trip a vast amount—some 267 yards of most superlatively magnificent and costly laces, which had been secreted in two or three small blue muslin envelopes in that one of her trunks (fol. 37).

That these laces descended to her as heir-looms through 400 or 500 years (fol. 72) and were made by her own ancestors on their family estate (fol. 33).

That they were "a marvel of beauty," "fine as cobwebs" (fols. 51 and 68), exquisite designs, like nothing ever brought to this country, "such laces as are only seen in the altar and priestly decorations of the richest Roman Catholic churches in Europe" (fol. 72). That in August, 1869, Paris had been searched through and through in vain to find something as fine as one of the smallest pieces of them (fol. 51).

That the art of making such laces is lost (fol. 38): and they were of the value of $150,000 and upwards (fol. 91 and preceding).

That before leaving New York she was advised by Mr. Phipps to make a safe deposit of the laces (fol. 68), but did not do it. On the trip she was similarly advised by Mr. Witthaus (fol. 55); both of these being gentlemen of experience and respectability.

That, although when she started on this trip she left in New York four trunks, she took these heirlooms with her (fol. 31).

That, on arriving at Albany, the trunk containing this "Bonanza," was thrown down among other baggage in the main hall of the Delavan House, and left there exposed for two nights and a day and a half (fol. 31), (where the same could not be seen from the office of the hotel, fol. 100), and where it was opened at least three times by Webber (31, 52), who kept the key (fol. 31).

That she carried a large quantity of other baggage on this same trip, which was safely delivered to her, being one trunk, one hat-box, four satchels, a bag of jewelry and a cage of birds (fol. 118), besides the trunk from which she claimed the laces had been abstracted, which was apparently a full trunk and filled with costly toilettes, some being ornamented with gold buttons set with diamonds (which were not stolen), and there being many loose pieces of lace, besides a package of lace delivered to her in this trunk (fols. 53, 117, and plaintiff's and Webber's testimony).

That the trunk was an ordinary piece of baggage in appearance, weighing 64 pounds (fol. 108), and that no disclosure of the character of the plaintiff nor of the value or nature of the plaintiff's baggage was made when it was delivered to the defendant (fol. 74).

On behalf of the defendant below, it was shown that the laces in question were not stolen by anybody in defendant's employ, and testimony was

given tending to show that the trunk had been safely cared for from the time it came into defendant's possession until it was delivered to plaintiff (fol. 102).

And it was offered to be shown by the defendant, but excluded by the Court, subject to the defendant's exceptions; that had the value of this trunk, or its laces, been declared, the Company would either have refused to receive it, and directed plaintiff to put it in charge of the Express Company, or extra compensation would have been charged for transporting it, and extra provision made for guarding it (fol. 76); that the average and usual value of passengers' baggage was $200 (fols. 77 and 103); that the laces, according to plaintiff's showing, were much more valuable than gold or greenbacks according to their bulk and weight (fol. 105); and that plaintiff was not in a sound mind nor a credible witness (fols. 97, 98, 99 and 101); on the trial no sample of the lace claimed to be lost was produced, nor of any lace comparable to it; but, on the other hand, the plaintiff had willfully carried away the six exhibits of laces to which she had testified on the taking of her deposition as being "absolutely the same thing" (fols. 40–44), and none of the plaintiff's witnesses as to the value had ever seen any of the lost laces or the said exhibits, which should have been attached to and filed with plaintiff's deposition; but all of them, subject to defendant's exceptions, were permitted to give valuations.

Subject to defendant's exceptions, a Commission in the Russ language was introduced, and another in the French language, on behalf of plaintiff, without any proof that the witnesses themselves could not be produced in Court.

Other objections and exceptions will also appear in the case.

The Court below made various errors in charging the jury, and refusing to grant defendant's requests to direct a verdict and for specific charges.

The jury found a verdict for $10,000, without interest.

The case was twice tried below, once in 1873, which was a mistrial, and once in January, 1875, with the result as stated above.

The defendant moved for a new trial, which was denied, and defendant below brings this writ of error.

## Statement of Errors Relied Upon.

*First*—The deposition of the plaintiff taken *de bene esse*, should not have been admitted in evidence for the following reasons:

1. That it appears upon these depositions themselves that the person who was sworn was "Olga de Maluta Fraloff," and the depositions are signed "Barbe de Fraloff," so that there is no identity as between the affiant and the subscriber of said depositions.

2. That it appears by the declaration, that the plaintiff in this action is a single woman, and in her depositions the affiant swears she is married, and has been for a number of years, and has a husband living, thus showing that the affiant is not the plaintiff, although recited to be in the deposition.

3. That the following facts do not appear in said depositions, nor in the magistrate's certificate therein.

(*a*) That the so-called interpreter was cautioned according to law.

(*b*) Or that the witness could not depose in the English language, with which by said depositions it appears she was acquainted so far that she corrected them herself.

(*c*) Or that the intervention of a third unmarried party as interpreter was necessary.

(*d*) Or the name of the interpreter, whether man, woman, or child, or that this undisclosed person was cautioned and examined as to his knowledge of the two languages, and his ability to translate each of them into the other respectively, or what he was sworn to do.

4. The law strictly requires that every person sworn before a commissioner shall be cautioned, and in the matter of cautioning the interpreter, he is not only to be cautioned by the magistrate that he should make a true interpretation from the English language, in which the questions are asked, into the foreign language in which the answers of the witness are made, but also that he should interpret those answers correctly from the foreign language into the English.

5. That it appears by the depositions, that six exhibits of lace were introduced in evidence before the commissioner, which should have been annexed to, or returned and filed with the depositions, but are missing; have never been annexed, returned, nor filed, and no attempt has been made to do either, and the depositions are mutilated, and do not contain the exhibits to which they refer, and upon which the testimony is based; and these exhibits of lace were at the time, knowingly and intentionally, carried away by the witness, in the presence and to the knowledge of the plaintiff's counsel, and without objection on their part, as appears in said depositions.

6. Generally that they are not depositions.

7. That defendant had never received the notice of the filing or return of the depositions, as required by the rule.

8. That on the former trial, two years ago, the plaintiff had notice of these objections to the depositions.

9. Generally that the evidence therein contained is incompetent, improper, and immaterial.

The Court having overruled the motion, and the several objections above set forth, counsel for the defendants then and there excepted severally to each of such rulings by the Court (fols. 25 to 28).

*Second*—The testimony as to the plaintiff's social position, standing and means was irrelevant and immaterial, and exceptions to its admission were duly taken (fols. 48, 62, 64, 65, 66, 109).

*Third*—The depositions of Peter Wycoff, taken in Russia, in the Russ language, should not have been admitted in evidence, for the following reasons:

1. That the answers in the original deposition were taken in the Russian language, and cannot be received as part of judicial proceedings in the United States, and it is contrary to the Statute of the State of New York.

2. That the sanction of the oath of the witness was not given to the translation.

3. That the taking and filing of the testimony in foreign languages is in violation of the Statute, which prohibits the filing of the deposition and making it any part of the proceedings in the case.

4. That it involved an expense to the defendant to ascertain what the testimony is, to its prejudice and damage, which is clearly illegal.

5. That the commission was directed to one person, with the alternative of its being executed by a second person in case of the death or absence of the first, and it appears that both of them signed the commission.

6. That it does not appear by whom the oath was administered to the witness, and for aught that appeared the oath might have been administered by

the second one of the two named, or by a third person, either of whom had no authority to execute the commission.

7. That it does not show that the witness was cautioned or sworn according to law, nor that the testimony was read over to the witness, or reduced to writing in his presence, before the magistrate, and signed before him by the witness.

8. That objections to the admission of the deposition were taken in open court about two years ago, so that the plaintiff had full notice of the objection thereto on the part of the defendant, and that the former ruling, which excluded the deposition on that trial, is binding in this action.

9. That the Court exercised and expended its authority in respect to the translation in issuing the commission, with instruction to have the answers translated into English.

10. That the answers should have been translated by the same interpreter who translated the questions.

11. That the translation is not reduced to writing in the presence of the magistrate, and signed before him by the witness.

12. That it does not appear who was the interpreter of the interrogatories into Russ, nor that such interpreter was duly cautioned and sworn.

13. That the defendant is taken entirely by surprise by the testimony which it may contain to its prejudice and damage.

14. That the document is not a commission, and, consequently, not evidence.

15. That the witnesses themselves should be produced personally, there being no proof that they are not now within the jurisdiction of the Court.

16. That the paper proposed to be read is insufficient and incompetent.

17. That the testimony itself is incompetent and immaterial.

18. That the defendant cannot read the answers to cross-interrogatories, and is, therefore, cut off from the benefit of them.

The Court thereupon overruled each and all of the objections above mentioned, and counsel for defendants then and there excepted severally to such rulings (fols. 57 to 61, and 67).

*Fourth*—It was error to refuse the reading of the depositions in the original language.

Counsel for defendants thereupon demanded that the answers to the questions annexed to said commission should be read in the language given by the witness and subscribed to by him in the presence of the commissioner, and stated that said demand applied severally to each of said answers (fol. 61).

The Court refused to grant the said demand as to each of said answers, and counsel for defendants then and there excepted to such refusal and rulings.

*Fifth*—It was error to admit a wholesale translation by Paroche.

Alexander Paroche being called as a witness on behalf of the plaintiff, to prove that a certain paper then shown to him was a correct translation of a certain deposition or commission in the Russ language, now on the file of this Court, and hereafter to be offered in evidence on the part of said plaintiff,——

Counsel for defendant thereupon objected to the introduction of said evidence and to the examination of the witness on that subject, as immaterial and irrelevant, and that the deposition should be in the English language and not require translation. The Court overruled the objection, and counsel for

defendants then and there duly severally excepted to such rulings (fol. 57).

*Sixth*—It was error to admit testimony as to what plaintiff had in New York, 150 miles away from the place where she claimed to have delivered the laces to the defendant, by witnesses who did not know whether what they saw in New York ever reached Albany or not.

Exceptions taken (fol. 68).

*Seventh*—It was error to exclude defendant's offered testimony to the effect that if defendant had been notified of the wonderful value secreted in this trunk it would have declined to have received it, or would have charged $\frac{1}{8}$ of one per cent. upon its value for compensation for transporting it, and that that was the usual course of the business of defendant in regard to all baggage where value was known (fol. 76).

*Eighth*—It was error to refuse defendant's offer to show that the average and usual value of trunks carried by passengers was only $200 (fols. 77 and 103).

*Ninth*—It was error to refuse the offer of the carrier to show what was its custom on the declaration of the value of baggage (76).

*Tenth*—It was error to admit any of the testimony on behalf of the plaintiff as to the value of the laces, because the samples thereof had been forcibly carried off by the plaintiff, and for the following reasons:

1. That the witness had not seen the said laces nor samples of them, nor samples of any laces proved to be like any of them.

2. That the witness had never bought or sold any such laces.

3. That witness swears the said laces have no market value in the City of New York.

4. That it appears from his testimony that they have no market value.

5. That the value above given and the value of said laces are entirely fanciful, uncertain, vague, shadowy, unknown and intangible.

6. That the whole of the evidence is irrelevant, immaterial and incompetent.

7. That the questions are objectionable and improper in substance and form.

8. That the names applied to the various kinds of laces are not understood alike by the different witnesses, and there is no proof that any of them meant the same kind of laces by those names that the plaintiff did.

9. And that the reading to an expert, what has been said of the general character of laces by other witnesses, does not thereby qualify him to judge of them or of their value, or to give cumulative evidence in the case.

The Court denied the motion as to each of the grounds stated, and counsel for defendant then and there severally excepted to such rulings (fol. 91.)

*Eleventh*—That it was improper to admit testimony of the value of laces in Europe (fol. 79).

*Twelfth.*—The exceptions to the particular questions put to these experts are well taken (fols. 79, 80, 81, 82, 83, 84), and the motion to strike out their testimony should have been granted (fol. 90).

*Thirteenth.*—Defendant's motion to dismiss the complaint or to instruct the jury to find a verdict for the defendant, ought to have been granted, for the following reasons :

1. A. That the obligation and contract of defendant with plaintiff is only to carry her; or, if it extends to her baggage, it is only to such ordinary baggage in reasonable quantities and value as is usually taken by travelers.

B. That articles of great or extraordinary value, such as the laces claimed to have been lost by plaintiff are alleged to be, are not within the liability of common carriers, and defendant cannot be charged with their loss, and the jury should render their verdict for the defendant.

2. That the plaintiff was guilty, whether intentionally or not, of unfair dealing amounting to fraud towards the defendant, which deprived the defendant of its just compensation and prevented it from protecting itself against the immense risk to which she subjected it, without notice, and without its knowledge or consent, and, therefore, the jury should render their verdict for defendant.

3. That the defendant carried for nothing and delivered to the plaintiff at Niagara Falls, according to her own testimony, much more baggage, or at least as much in value, bulk, and weight, as she had the right to expect or demand, which is a defense, and precludes a recovery in this action, and the jury should render their verdict for the defendant.

4. That the laces were not ordinary baggage or wearing apparel for plaintiff, even if all her pretensions as to wealth and rank be admitted, and therefore the verdict should be for the defendant.

5. That the evidence shows that the plaintiff carried with her on defendant's railroad the laces alleged to have been lost, for transportation only, and they formed no portion of her wearing apparel for the purpose of her journey, and their presence is not excused by any anticipated use of them, and therefore the verdict should be for defendant.

6. That plaintiff cannot recover for any articles except such as she had the right in law to demand to be carried, and for refusing to carry which defendant should be liable to an indictment or to an action for damages, and these laces are not such, wherefore the jury should render their verdict for defendant.

7. That there is no evidence sufficient to justify submitting the question to the jury of any negligence on the part of the defendants which in any degree contributed to the plaintiff's loss, and the jury should render their verdict for the defendants.

8. That the plaintiff was guilty of negligence, which contributed to her loss, and the jury should render their verdict for the defendants.

9. Where the evidence is uncontradicted as here, the court should pass upon the questions and not leave them to the jury, and should instruct the jury to find for the defendant.

10. That the plaintiff, being a married woman, is not entitled to maintain this action.

The court refused to give either of the instructions prayed for, and counsel for the defendants then and there separately excepted to the refusal as to each request (fol. 95).

*Fourteenth.*—As plaintiff was an entire stranger, and utterly without any reputation in this country, defendant was entitled to show anything in her conduct and procedure that would affect her credibility before the jury, and it was a series of errors to refuse defendant's offers to show how she and Webber were registered on the ship's return book of passengers per "Westphalia," on coming to this country (fol. 96); and her manners and doings in the boarding house in New York (fol. 96); that she was strange and out of her head (fols. 97 & 98): that she was troubled with spasms (fol. 98); that

she drank freely; used to sit up nearly all night playing cards and drinking wine with Webber; that she would go around the house, and in the parlor by the hour, in a half dressed condition (fols. 98, 99 & 101). That she was afflicted with the idea that she had been robbed of things when it was not true (fol. 102).

*Fifteenth*—It was error to prevent defendant from showing how small a space the alleged stolen laces occupied (fol. 101).

*Sixteenth*—As this trunk, with all the plaintiff's baggage, had been in charge of Mr. Swallow, the baggage-master on that trip, it was error to forbid the defendant showing his good reputation by those who had known him many years (fol. 102).

*Seventeenth*—It was error to prevent defendant showing that many passengers carried no baggage at all (fol. 103); and that never had a claim anything like the present been made upon it for an immense sum for an insignificant fractional part of a traveler's baggage (fol. 103); and from showing the general security of baggage (fol. 104).

*Eighteenth*—It was error to prevent defendant showing that coupon tickets were sold at Albany at that time for places beyond the State of New York, as bearing upon the intention of the plaintiff in regard to her trip, and her presumable notice to this defendant as to what her intended trip was, since she bought no such coupon ticket (fol. 105).

*Nineteenth*—It was error to exclude the offer to show the weight and bulk of gold coin, and greenbacks, and the consequent greater value than either of the alleged lost laces (fols. 105 and 106).

*Twentieth*—It was error to admit the deposition, in French, of Colonel Fraloff, for the same reasons above stated, as to the deposition of Peter Whycoff;

and the translation thereof by Mr. Bodisco, for the same reason as above given, against the admission of the translation of the Russ, by Paroche, and for the further reason, that defendant was entitled to have that testimony put in before the plaintiff originally rested, if at all (fols. 108 and 109).

*Twenty-first*—At the conclusion of the whole case, the Court should have dismissed the complaint, or directed a verdict for defendant (fol. 109).

*Twenty-second*—Defendant's exceptions to the following portions of the judge's charge are well taken (fol. 119).

1st. To that which says that an adroit or expert thief might have taken the laces, upon an opportunity which may have been offered to him by defendant to do so, inasmuch as there is no evidence of anything of the sort, but the evidence is to the contrary.

2d. To that which says that the defendant is liable if Webber took the laces after they were intrusted to the defendant; on the ground that Webber was the plaintiff's agent in the matter (fol. 111).

3d. To that which says that the question of the amount of baggage for which defendant is to be deemed liable is to be determined by the rank, means, and tastes, &c., of the plaintiff; and that the fancied wants of some are as real as the substantial wants of others, there having been no proof as to what is the ordinary baggage carried by other ladies of her rank, distinction, and taste (fol. 113).

4th. To that which says that Webber may have entered the different names to suit his own whim.

5th. To the exclusion of testimony as to particu-

lar acts of plaintiff as affecting the question of her credibility.

6th. To the Court's limiting the amount of baggage to be taken by the word "reasonable," and not by the words "ordinary baggage" (fols. 111, 113, 115, 116, 118, 122).

7th. To that portion which holds that the defendant is liable for baggage as insurer, except as against the acts of God and the public enemies (fol. 119).

8th. To that portion which directed that the jury might consider the whole journey plaintiff intended taking in this country (fol. 119).

9th. To that which says defendant admits itself to be a carrier of passengers and their "reasonable baggage" (fol. 110).

10th. To that which treats of defendant's officers having reason to suppose that the baggage had articles of such great value (fol. 114).

11th. That the jury might allow for a portion of the lace claimed to be lost; although they should think the whole of them to be unreasonable in amount (fol. 117).

12th. To the instructions as to ascertaining the value of the laces (fol. 116, 123).

13th. That the question of fraud is not in the case (fol. 122).

14th. That there is no dispute upon the evidence, that if the laces were in the trunk when delivered to defendant at Albany, they were not delivered to her at Niagara Falls (fol. 110).

[A JUROR:—I should like to inquire whether any rulings or decisions have been made in the case,

with reference to the proper notice, as to the unusual amount or value of the baggage carried, or its being a fraud not to give such notice.]

[THE COURT:—I have not alluded to that question, because I have considered that question not in this case] (fol. 122).

To which defendant's counsel duly excepted (fol. 122).

*Twenty-third*—The defendant's several requests to charge, should have been granted by the Court below, as follows:

1. That the jury and each of them, must be satisfied that the laces in question were delivered to the defendant at Albany, and not delivered to plaintiff at Niagara Falls, before they can find a verdict for the plaintiff.

2. That the plaintiff, if entitled to recover, is only entitled to recover the value of her ordinary baggage.

3. That if the laces in question are not satisfactorily shown by the evidence to have been carried by the plaintiff on the journey from Albany to Niagara Falls (if so carried or delivered to be carried) for the purpose of wearing on said journey or at its termination, the defendants are not liable.

4. That if the jury believes the laces in question were not ordinary baggage, the defendants are not liable.

5. The laces which are the subject of this action, were not ordinary and usual baggage of plaintiff for the purposes of her journey; wherefore she cannot recover.

5½. That if the jury find for the plaintiff, they

can only find the market value of the laces in question.

6. That there is no evidence of market value in the case.

7. That in estimating the market value, the jury must limit themselves to evidence of market value, and must exclude conjecture or speculation as to what the laces in question ought to be worth, as compared with laces of different size, or material, or style, the market value of which may been proved.

8. That if the jury believe that there was fraud or imposition on the part of the plaintiff, in not disclosing to the defendants the alleged high value of the laces in question, the defendants are not liable.

9. The plaintiff was guilty of fraud in failing to disclose, whether intentionally or not, the character of her baggage as to laces; wherefore she cannot recover.

10. In order to make the defendant, as a common carrier, liable for these laces, in view of the evidence as to their description, quantity, and quality, and the claim of the plaintiff as to their value, it being admitted that the defendant had no notice whatever that the laces were in the trunk, or that the trunk contained anything of extraordinary or unusual character or value, or anything but ordinary baggage, common justice and the law required that the defendant should be informed of the nature and importance of its charge, so that it might take the necessary precautions for the safety of the laces and its own protection, which it is admitted was not done; wherefore the defendant, under the evidence, is not liable for the loss of the laces.

11. Presenting the trunk to defendant and procuring the defendant to receive and check it as bag-

gage without notice to it, and it having no knowledge or notice as to the laces or the extraordinary character, extent, or value of them, was a virtual concealment of the laces, their extraordinary character, extent, and value, and was unfairness, calculated to deceive the defendant, and the plaintiff is not entitled to recover.

12. That, if the jury believe that the laces in question were not the ordinary baggage of the plaintiff, then it was the duty of the plaintiff to have disclosed to the defendant the fact that laces of the alleged value of the laces in question were contained in the trunk.

13. That, in determining whether the laces in question were part of the ordinary baggage of the plaintiff, the jury must take into consideration the extent of the other effects carried by the defendant without compensation other than the same fare which she would have paid if without baggage.

14. That, in determining whether the laces in question were the plaintiff's ordinary baggage, the jury must consider whether the plaintiff would, on her journey, or at its termination, have used for personal wear or adornment the laces in question.

15. If the jury find that defendant delivered plaintiff at Niagara Falls a reasonable amount of ordinary and usual baggage and wearing apparel, their verdict will be for the defendant.

16. That, if the jury find that the laces, alleged as lost, were of an extraordinary character and value, and unusual in quantity, their verdict will be for the defendant.

17. As no declaration of the unusual value of these laces was made to defendant, and their unusual value, as well as the alleged quality and rank

of plaintiff, were concealed from defendant, the jury are not to be influenced in arriving at their decision by consideration of the rank or quality of the plaintiff, but are to consider her, as she by her conduct represented herself to be, as an ordinary traveler, to whom defendant owed no greater duty than to any other respectable lady-passenger.

18. That it is the duty of the plaintiff to convince the jury, and each of them, that all the laces alleged to be lost, and of the description asserted by the plaintiff, were actually in the trunk when delivered to defendants at Albany; and if the evidence is not satisfactory on this point, or if the jury are in doubt about it, they should give the defendant the benefit of that doubt and return a verdict for defendant.

19. In determining the foregoing question, the jury are to consider the fact that the trunk was originally packed at a distance of 150 miles from the place where it was delivered to defendant; that the testimony as to what quantity of laces were packed, and the parts of the trunk where packed, is conflicting; that Webber, according to plaintiff's testimony, went to the trunk at Albany, at least one time more than he testified to himself; that he, by going to all the great lace stores in Paris, had become familiar with the great value of these laces; and the fact that these laces were wrapped up and covered so that they could not be seen at a hasty glance, and that diamonds and gold buttons, things generally prized by thieves, were not taken, besides the other testimony bearing upon this subject.

20. If the jury find that plaintiff concealed from defendant the extraordinary character and value of the laces, and procured defendant to receive and check the trunk as ordinary baggage, then she committed a fraud upon defendant, whether intended or not, and she cannot recover.

21. That the evidence shows that defendant received no compensation for assuming the risk of transporting these laces, the law justly confining the compensation that was paid to the transportation of the person and her ordinary baggage.

22. That the jury, in considering the nature and object of her trip, are to consider the season of the year in which it was made; the fact that she had no coupon tickets for a further western trip beyond Niagara; that the leading hotels at that watering-place were closed; that she has shown no expectation of wearing these laces at any place where she even conjectured she might go, and unless she had occasion to wear them and anticipated that occasion, they were not her ordinary baggage in the proper sense of the words, and she cannot recover.

23. If the plaintiff has not shown to the satisfaction of the jury, and each of them, a reasonable expectation of wearing the laces at a near time to her taking her trip from Albany, she cannot recover.

24. If the jury believe that plaintiff was warned against traveling with such rare and valuable laces before she left New York, and that, in view of this warning, she did not act with reasonable prudence in persisting in carrying her laces with her, she cannot recover.

25. If the jury believe that plaintiff left behind her her usual and ordinary baggage, and selected her most expensive and valuable articles to take with her to Niagara, their verdict will be for defendant.

26. The jury were not to infer from the fact that the Court denied the defendant's motion to instruct the jury to find for the defendant that the Court is of opinion that the plaintiff ought to recover.

27. If on any one of these propositions each mem-

ber of the jury is not satisfied, they cannot render a verdict in the case.

28. That the contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience.

29. If the jury believe that the plaintiff, by her method of treating the trunk in question, led defendant to believe that it contained no articles of unusual value, then she cannot recover.

30. If the jury believe that by the plaintiff's conduct the defendant was prevented from charging and receiving a just compensation for transporting her laces, or was deprived of the opportunity of protecting itself against loss, in respect to them, their verdict will be for defendant.

31. If the jury believe that the trunk was insufficient and inadequate for the safe transportation of such laces, their verdict will be for the defendant.

32. That under no circumstances can the plaintiff recover for the value of any article which she had not the right to demand should be carried, if the value had been declared.

33. The plaintiff cannot recover for the value of any article for the refusing to carry which defendant would not be liable to an indictment, or to an action for damages.

34. That these laces were not such an article.

35. That unless the plaintiff has proved, to the satisfaction of the jury, and each of them, that the defendant has been guilty of negligence, she cannot recover.

36. That if the jury believe that the plaintiff herself was guilty of negligence which contributed to

the loss, she cannot recover; and in determining this question, they may consider all the circumstances of the packing of the trunk at New York, the manner in which it was left among the hotel baggage at the Delavan House, for two nights and a day and a half, the number of times it was opened there, the character of the trunk itself, and the other evidence bearing on the question.

37. If the jury believe that plaintiff, in her testimony, has misrepresented either the quantity, character, or value of the laces, she cannot recover.

38. If the jury believe that the locks of the trunk were pulled out by the ordinary handling and shaking of the baggage, and the laces were lost in consequence, without fault on part of the defendant, their verdict will be for defendant.

39. If the jury believe that the trunk, when delivered to plaintiff at Niagara Falls, contained a reasonable amount of laces for the plaintiff to carry with her on this trip, their verdict will be for defendant.

40. If the jury find for the plaintiff, they shall assess the damages for such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and amusement, or protection, having regard to the object and length of the journey.

41. Even if the jury think that the laces were lost, as claimed by plaintiff, yet if they are unable to fix the market value of these laces, they should find a nominal verdict for the plaintiff.

The Court declined to charge as requested, otherwise than as heretofore charged, and thereupon defendant's counsel duly and severally excepted to such refusal in respect to each of the requests above made (fol. 134).

## POINTS.

### I.

**The evidence of the delivery of the laces in the passenger's baggage, was insufficient in law.**

The burden of proof was upon the plaintiff below.

Even if the laces were hidden in the trunk, in New York (the evidence about which was uncertain and contradictory), there was no positive proof of their being there three days subsequently, at Albany, 150 miles distant, after the trunk had been out of plaintiff's custody, and in the hands of seven or eight different strangers, and had been publicly exposed, unguarded, by the bar-room of the Delevan House for two nights and a day and a half, and opened two or three times. The plaintiff did not see the laces in Albany. The trunk was not taken to their rooms. She did not go to the trunk at all. (Fol. 31.)

The only evidence given to prove the laces in the trunk at the time of the delivery was that of Weber, who testified that in Albany he twice opened the trunk, in the public hall, and "saw the blue borders of the envelopes that contained the laces." (Fol. 52.)

How could he know that the envelopes then contained the laces? He did not open them. He did not see the laces. It was simply a conclusion of his own.

This was entirely insufficient in law. Seeing the outside of a jewelry box does not enable a person to swear that diamonds were then in it.

On the first trial the jury were not convinced that the laces claimed were in plaintiff's trunk.

## II.

**The plaintiff below was guilty of unfair dealing, amounting to fraud towards defendant, and deprived defendant of just compensation, and prevented it from protecting itself against the immense risk to which she subjected it without notice.**

It was admitted that plaintiff below gave the carrier no notice of her pretensions to high rank, or that she delivered such unusual, rare, extremely precious and extraordinarily valuable things, worth more than $150,000, hidden in a very small space, among her ordinary baggage, in her ordinary-looking trunk (fol. 74.)

Fraud includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and which are injurious to another, or by which an undue or unconscionable advantage is taken of another.

1 *Story Eq.*, 187, *Gale* v. *Gales*, 19 Barb., 249.

Fraud coupled with damage entitles the injured party to relief in any court of justice.

*Bacon* v. *Bronson*, 7 Johns. Ch., 194.

Such fraud, even when means of knowledge are within the reach of the insurer, vitiates a policy. Thus, the confederate cruiser, "Georgia," was insured by defendant as the steamship "Georgia." She put to sea and was captured by a United States frigate. In action on policy, jury found defendant was not aware that the vessel was the same cruiser, but that he had abundant means of so identifying her at the time of underwriting, from his previous knowledge, general report, coupled with the particulars given by the plaintiff. *Held*, That a material fact had been concealed by plaintiff, and defendant was entitled to verdict.

*Bates* v. *Hewitt*, L. R., 2 Q. B., 595.

"Deception may as easily be effected by impos-

" ing upon the carrier valuable merchandise under " the guise of owner's traveling baggage, as by a " direct verbal misrepresentation."

*Richards* v. *Westcott*, 2 Bosworth R., 589.

" The principle is, that a carrier is not liable for " property where the conduct of the owner, in com- " mitting it to him, is such as to tend to deceive " him as to its nature and value.

*Ib.*

" If the owner be guilty of any fraud or imposi- " tion, as by concealing the value or nature of the " article, or deludes him by his own carelessness in " treating the parcel as a thing of no value, he can- " not hold him liable for the loss."

*Merrill* v. *Grinnell*, 30 N. Y., 616.

In the "*Ionic*," 5th Blatchford, 538, after deducting from the value of the lost trunk gold ornaments for presents, $450, and American gold, $60, the Court found the rest of the contents to come fairly within the carrier's liability. But the passenger, having told the captain that he had nothing in his trunk but clothing, the Court says "the answer " was disingenuous, and tended to mislead the cap- " tain, who, if the truth had been stated, might, " and probably would, have protected his vessel " from loss." Dismissal of the libel confirmed.

(Donohue for claimant) Nelson, *J.*

Carriers are not liable for valuables packed in such a way as to deceive and mislead them. If they are to be held liable, they should be told of its contents.

*Chicago & Aurora R. R.* v. *Thompson*, 19 Ill., 578.

"Concealment, artifice or suppression of the " truth will relieve carriers of their liability."

*American Express Co.* v. *Perkins*, 42 Ill., 458.

"If consignor studiously conceal from the car-
"rier, or misrepresent the value or nature of the
"goods, the ship-owner is not liable if they are pur-
"loined on the passage, but the wrong-doer would
"be"

*Reef* v. *Rapp*, 3 Watts & Sargeant, 21.
*Kuter* v. *Mich*, Cent. R. R., 1 Bissell 35.

"If a passenger surreptitiously introduces into a
"coach an article of great value, with the view of
"getting it carried for nothing, he is guilty of a
"gross fraud, and, in case of loss, cannot recover."

*Hellman* v. *Holliday*, 1 Woolworth C. C., 365. Miller, *J.*

"Upon the ground that defendant received no
"compensation or reward for the transportation or
"risk of the article in question, and was deprived
"of such reward by plaintiff's unfair dealing with
"defendant, plaintiff cannot recover. In absence
"of notice by carriers, limiting their responsibility,
"if any means are used to conceal the value of the
"article, and thereby the owner avoids paying a
"reasonable compensation for the risk, this unfair-
"ness and its consequences to defendant, upon
"principles of common justice, will exempt defend-
"ant from responsibility. Such a result is alike
"due to defendant, who has received no reward for
"the risk, and to the party who has been the cause
"of it, by means of disingenuous and unfair deal-
"ing. Plaintiff's representation of this trunk and
"the contents was not a fair one, was calculated to
"deceive, and it would be a violation of first princi-
"ples to permit the plaintiff to recover." Nelson, *J.*

*Orange Co. Bank* v. *Brown*, 9 Wendell, 85, cited and approved, and S. P. Magnin *vs.* Dinsmore, 62 N. Y., 35.

"I would not say that the plaintiff intended to
"impose upon the defendant; this is not ma-
"terial. It is sufficient that this is the practical
"effect of his conduct. The defendant is thus
"doubly wronged: 1st, deprived of his just reward

"for carrying the goods; and, 2d, prevented from "exercising proper precaution against the dangers "to which the property may be exposed." (A trunk containing silk worth $318 was lost.) *Held*, a nonsuit should have been granted.

*Pardee* v. *Drew*, 25 Wendell, 459.

"If you do not give carriers notice, they cannot "know the contents of the package and the risk "they run. They might have demanded an extra "payment had they known it. If they had had "notice they might have refused to carry it with-"out an additional payment; but they had no op-"portunity of acquiring this knowledge in this case. "Whether this was done with any fraudulent inten-"tion is not material, for if without any fraud, the "passenger so conducted himself that the company "was not apprised of the nature of what it was "carrying, it is the same in effect as if a fraud had "been intended."

*Great Northern Railway* v. *Shepherd*, 14 E. L. & E., 368.

"It is not solely on the ground of fraud that con-"cealment avoids the contract. The omission to "state material circumstances, though the omission "be the result of accident or negligence, will avoid "it."

*Chicago & Aurora R. R.* v. *Thompson*, (*supra.*)

Plaintiff presented an ordinary travel-worn trunk as a part of her baggage just as the train was starting—an article that she had treated most carelessly for days in Albany, which had had many a knock and tumble in traveling thousands of miles by sea and land. She treated it as a thing of no special value, and it was so received by plaintiff. It was not even a robust trunk, nor a new trunk, and secreted in it, hidden among things that of themselves pretty completely filled the trunk, occupying but little room, and weighing almost nothing, was lace as she claims of incalculable value, worth hun-

dreds of thousands of dollars. Were there not concealment and unfair dealing here?

Is the carrier created to be exposed to such risk and deception without protection or relief?

If the value had been declared, defendant might have protected itself against loss, by having a special guard put upon the trunk, by refusing to carry it, by demanding proper compensation for the risk, but plaintiff's conduct prevented all this.

Lace so valuable, that prudent people like her witness Phipps, had advised her not to travel with it, was treated by her like traveling shawls, toothbrushes and cigarettes, as needing no greater protection, and defendant took them as such. Her witness, Witthaus, gave her similar advice (fols. 55 and 68).

This warning given by Phipps and others can now be availed of by defendant, as if given by defendant, for it amounts to a notice that she could not have such articles carried as baggage unless she resorted to deception, concealment and unfair dealing, to all of which she did resort, and this entirely relieves defendant.

This Court will take notice that had defendant below been notified of, or had any reason to suspect the invaluable contents of this trunk, it would have charged an adequate compensation for its risk in transporting it (fol. 76).

It was the extreme value concentrated in this little bulk of lace, which was the inducement to the theft (if any), and caused it to be stolen (if ever delivered to the carrier) and the concealment of this extraordinary value puts this case on all fours with the "Ionic," (*supra*).

It is fraud not to disclose the true value of articles intrusted to the care of a common carrier.

Westcott *v.* Fargo, 61 N. Y., 542.
Clay *v.* Willan, 1 H. Black, 298.
Izett *v.* Mountain, 5 East., 370.
Nicholson *v.* Willan, 5 East. 507.

Bignold *v.* Waterhouse, 1 Maule & Selwyn, 259.
Batson *v.* Donovan, 4 Barn. & Ald., 21, and opinion of Holroyd, *J.*,
Parrott *v.* Anderson, 14 Eng. L. & Eq., 371.
And the other cases cited in this brief.

## III.

**The carrier made no contract, and had no obligation to carry any baggage for this passenger. Her right (if any), to have her baggage carried, arose only from the indulgence and courtesy of the carrier, which did not include articles of such prodigious value.**

(1) The Common Law liability of carriers as insurers, applicable to freight, never extended to passengers and baggage.

Aston *vs.* Heaven, 2 Esp., 533.
Feital *vs.* R. R., 109 Mass., 398.
McPadden *vs.* N. Y. C. R. R. Co., 44 N. Y., 478.
Readhead *vs.* Railway L. R., 2 Q. B., 412.
Meier *vs.* Pa. R., 64 Pa., 225.
Hinds *vs.* Pitts., Ft. Wayne & C. R. R. Co., 53 Penn., 512.
Withers *vs.* North Trent. R. R., 3 H. & N. 969.
Cleveland *vs.* New Jersey St. Bt. Co., 68 N. Y., 310.
Queens Bench, Cockburn *C. J.*, Stokes *vs.* Eastern Counties Railway, 2 Foster & Fieslason, 691.
Wonder *vs.* Baltimore & Ohio R. R. Co., 32 Md., 411.
Boyce *vs.* Anderson, 2 Peters, 150.

Bowen *vs.* N. Y. C. & H. R. R. R. Co., 18 N. Y., 408.
Curtis *vs.* Roch. & Sy. R. R. Co., 18 N. Y., 534.
Hammack *vs.* White, 11 C. B. (N. S.), 587, 594.
Frank *vs.* Potter, 17 Ill., 496.
Monroe *vs.* Leach, 7 Met., 274.
Chrocheron *vs.* N. Shore Staten Island Ferry Co., 56 N. Y., 656.
Dougan *vs.* Champlain Tran. Co., 56 N. Y., 1.

The common-law liability was intended for an age of general rapine and plunder, and is totally inappropriate to modern society and facilities of travel. But in England, the carrier has been repeatedly held not liable for baggage unless specially rewarded for carrying it.

1 Vin. Abr., 220, and cases there cited.

In Europe generally, an additional charge is made for transporting baggage.

The ancient common law never applied in this country to *anything*.

Wheaton *v.* Peters, 8 Peters, 658.

If there is any common law regulation in New York State as to baggage, it is to be gathered from decisions in that State (8 Peters, 659), and it remains as stated and limited by Judge Nelson, in 1832, in Orange Co. Bank *v.* Brown, 9 Wend., 116; and, as he says, it grows out of the "custom or the courtesy of the carrier; * * * but courts ought not to allow this gratuity or custom to be abused; * * * nor to include articles not within the object or intent of the indulgence of the carrier."

To the same effect are:

Noidemeyer *v.* Loescher, 1 Hilton, 449.
Hawkins *v.* Hopkins, 6 Hill, 586.
Merrill *v.* Grinnell, 30 N. Y., 594.
Dexter *v.* Syracuse B. & N. Y. R. R., 42 N. Y., 326.

(2) No obligation to carry baggage was imposed by the statute incorporating this carrier.

The statute, after naming the different companies authorized to consolidate and form the New York Central Railroad Company, enacts on the subject only that "said consolidated company shall carry way passengers on their road at a rate not to exceed two cents per mile."

No obligation to carry baggage is here imposed.

(The consolidation under the N. Y. Statute of 1869, Ch. 917, forming the plaintiff in error, went into operation subsequent to the alleged loss, and prior to action brought.)

(3) It was "not within the object or intent of this indulgence of the carrier," to transport gratuitously for this passenger hundreds of thousands dollars worth of property under a guaranty or insurance, without even knowing it.

The carrier offered to show that by its custom and courtesy, it would carry not to exceed 100 lbs. of baggage for a passenger gratuitously (and this passenger's baggage weighed two or three times this amount), and always charged extra for everything beyond that when offered in time for weighing, and that it would have charged a commission on the value of this lace by way of compensation for its transportation had it known or been informed thereof.

This Court will take cognizance of this as if proved, for the exclusion below of the offered testimony was certainly error.

This "custom, indulgence or courtesy of the carrier," the law presumes to be known to the passenger, and precludes any recovery in this case.

The "custom of the carrier" was endeavored to be availed of to force it to carry a certain weight, irre-

spective of the kind of articles, but the attempt was defeated by the Court.

Hudson *v.* Midland Railway, 4 Q. B., 366.

The American courts have decided that carriers are not liable for the following articles in a passenger's baggage, however convenient or usual to the passenger:

*Not for silverware.*

*Bell* v. *Drew*, 4 E. D. Smith, 59.
*Knowlton* v. *Harlem R. R.* (not reported), Marine Court, N. Y. City, 1874.

*Not for merchandise or samples.*

*Pardie* v. *Drew*, 25 Wend., 459.
*Hawkins* v. *Hopkins*, 6 Hill, 589.

(Same rule in England.)

*Great Nor. Railway* v. *Shepherd*, 14 Eng. L. and E., 368.
*Green* v. *Hudson River R. R.*, ms.

*Not for jewelry.*

*Richards* v. *Westcott*, 2 Bos., 589.
*Nevins* v. *Bay State Co.*, 4 Bos., 225.
*The "Ionic,"* 5 Blatch., 538.
*Swift* v. *Hannibal & St. Jo. R. R.*, 12 Wall, 263.

*Not for presents for friends,*

*Nevins* v. *Bay State Steamboat Co.*, 4 Bos., 225.

(even though cloth for a dress).

*Dexter* v. *Syracuse*, 41 N. Y., 326.

*Not for Masonic regalia* (although it is apparel).

*Nevins* v. *Bay State Co.*, (*supra*).

*Not for money.*

*Orange County Bank* v. *Brown.*
*The "Ionic," supra.*

*Chicago & Aurora R. R.*, v. *Thompson*, 19 Ill., 578.
*Hickox* v. *Naugatuck R. R.*, 31 Conn., 284.

*Not for anything carried for the purpose of transportation.*
*Merrill* v. *Grinnell*, 30 N. Y., 594.

*Not for two Pistols.*
Both had been allowed by the jury, and the Appellate Court struck one out.
*Chi., R. I. & Pac. R. R.* v. *Collins*, 56 Ill., 22.

*Not for an article of great value.*
*Hellman* v. *Holladay*, 1 Woolworth C. C., Miller, *J.*, 365.

*Not for unpublished Manuscripts.*
*Swift* v. *Hannibal R. R.*, 12 Wall., 263.

*Not for a trunk of Laces.*
*Dibble* v. *Brown*, 12 Georgia, 218, 227.

In accordance with which are various statutes which did not make, but are simply declaratory of, the law, as it existed before.

By U. S. Revised Statutes, § 4,281, ship owners are not liable for "platina, gold, gold dust, silver, * * * jewelry, * * * furs or lace," laden as freight or baggage, unless written notice be given of the true character and value thereof, &c.

The English Carriers' Act, 11 Geo. 4 and 1 W. 4, exempts carriers from liability for loss beyond £10, unless the value be declared and extra compensation paid. The Common Law there is the same, the rule being adopted and enforced in countless cases.
*Baxendale* v. *Gt. Eastern R.* (L. R. 4 Q. B. Ex., ch. 244).
*Henderson* v. *London & N. W. Railway*, 5 Ex., 90.

*Le fouteur* v. *London & S. W. Railway.*
L. R. 1. Q. B., 54.

In Michigan, the owner of a lost trunk can only recover $150.

Laws of 1850, p. 307.

In Massachusetts, the carrier's liability is limited to $600.

Many other States have passed similar statutes limiting the carrier's liability for baggage to a few hundred dollars under *all* circumstances, and thereby declaring and reducing such liability.

It may be inferred from Hopkins *v.* Westcott, 6 Blatch., 64, that the Court was of opinion that the value of an ordinary traveler's trunk and necessary contents would be under $1,000.

In Merrill *v.* Grinnell, 30 N. Y., 594, a distinction is drawn between the baggage of the poor and the rich, to the effect that the former might be $100 and the latter $500.

(In this case, $1,991 were allowed to be recovered; but the whole trunk and all its contents were lost, and the value had been declared, the baggage exhibited, and the article of chief value, amounting to $800, had been prepared for packing in the baggage by the carrier's agent himself.)

But if there be any obligation on the carrier to carry baggage with the passenger, then it is imposed by statute, which excludes this *rara avis* from his liability ; for,

## IV.

**The General Railroad Law of New York provides for the carriage of ORDINARY BAGGAGE only, which these priceless cobwebs, these heirlooms, more valuable than gold or gems, and like nothing ever seen in this country before or since, are not.**

(1) The New York General Railroad Act, 1850, ch. 140, sec. 28, sub. 7 and 9, applies to companies formed thereunder, and enacts: "but such compensation for any passenger and his *ordinary* baggage shall not exceed three cents per mile."

(2) Webster's definition of ordinary is: "1. According to the established order; methodical; regular; customary; as, the ordinary forms of law or justice. 2. Of common rank; not distinguished by superior excellence. 3. Common; usual. 4. Hence, inferior; of little merit. 5. Plain; not handsome."

(3) These laces were not ordinary, for they were 267 yards (fol. 14) "of rare and most valuable laces" (fol. 32). "They were from two to two centuries and a half old" (fol. 34). "They descended to her as heirlooms through 400 or 500 years" (fol. 72). They might "appear to you extraordinary" (fol. 35). "The Queen of England is the only other person who has any like it" (fol. 33). "They were made by plaintiff's ancestors on their estates in Russia" (fol. 33). "The art of making them has been lost" (fol. 38). "It was impossible to find in all Paris a piece like them" (fol. 51). "They were like a cobweb" (fol. 51). "They were perfect gossamer, just like cobwebs as to fineness" (fol. 68), "fine as cobweb with exquisite designs," (fol. 72). "They could only be used for going to Court, they could not be used anywhere else, they were too magnificent" (fol. 69.) "They

very old and looked very magnificent. Never saw such a thing before," (fols. 67 and 70). "She never wore any of them," (fol. 70). "Like nothing ever brought to this country." "Such laces as only are seen in the altar and priestly decorations of the richest Roman Catholic churches abroad" (fol. 72). Medium quality of some of them were worth $900 a yard (fols. 82 and 89). They would go in a hand satchel 12 inches long by 8 inches high, and 4 inches thick (fol. 101), and yet were worth over $200,000 (fols. 91 and 89).

(4) The laces were extraordinary in quantity, quality and value.

(5) The laces were in no legitimate sense baggage. They were not necessaries or conveniences. They had never been worn in this country, nor were they expected to be worn in this country. The plaintiff below made no visits in this country (fol. 35), nor did a soul call upon her (fol. 70). She "did not come to seek society, but intended to see the prairies, the forests and birds of America;" "she might visit California, New Orleans and Havana, and wanted to go to Rio Janeiro" (fol. 35). She did go to Niagara Falls in November, when "all the large hotels were closed for the season" (fol. 53.)

On this trip she did not have with her a single dress on which any of these laces had ever been worn (fol. 38).

(6) On her own showing the carrier discharged its full duty in respect to carrying laces for her, because it did carry for and deliver to her one blue envelope of laces (fol. 53), "and pieces of laces," and "laces for the head" (fol. 37); the small pieces whereof were worth thousands of francs (fol. 53), and the whole so delivered must have been worth $50,000.

And the carrier also delivered her a large lot of other baggage (trunks, bags, jewelry, &c., fols. 31, 117, 118), and, also, the alleged delinquent trunk, *full* of her articles.

## V.

**Carriers are liable for ordinary baggage, only in moderate quantities, such as is usually taken by travelers; but plaintiff sues for extraordinary articles in immoderate quantities.**

In *Nordemeyer* v. *Loescher* (1 Hilton, 499), the Court says: "An agreement to carry a passenger and his "baggage includes only ordinary baggage, or such "articles of necessity or convenience as are usually "carried by passengers."

In *Hawkins* v. *Hopkins* (6 Hill, 586), the Court says: "Baggage, within the rule of the carrier's liability, is confined to such articles as are usually carried as baggage for the personal use of the passenger, or for his convenience, instruction or amusement on the way, but this liability is not to be extended beyond ordinary baggage, or such things as a traveler usually carries with him."

In *Dexter* v. *Syracuse* (42 N. Y., 326), the Court allowed a recovery (for $304 $\frac{10}{100}$) for a lost trunk, after striking out $7 (the value of a dress for plaintiff's landlady), only on the ground that "the trunk was of such a description, *with its contents*, as was customarily taken and carried unquestioned by all travelers."

In *Swift* v. *Hannibal*, R. R. (12 Wallace, 274,) the U. S. Supreme Court says unanimously that "the "contract to carry the person only implies an un- "dertaking to transport such a limited quantity of "articles as are ordinarily taken by travelers for "their personal use and convenience."

This rule is sustained by reason and the nature of the case. Defendant is a *common* carrier. It cannot know the station in life, the riches or poverty of its passengers, nor the value of the passenger's baggage, unless declared. Each passenger pays for his carriage an immensely smaller sum than it would cost to transport him alone—and thus gets the advantage of traveling in common. To the carrier a passenger is only a passenger; whether white or black, rich or poor, foreign or native, he represents just his own contribution towards the common expense of the trip, and nothing more. In return, the passenger is to be carried, in common with others, just as others are, and receive the same courtesy, and no other. To protect the carrier against imposition, the courts have adopted the rule that the passenger making a claim for lost baggage, must prove, even within the limits of the small liability of the carrier, that his station in life, and the object and length of his journey, are such as to entitle him to the compensation he demands.

*Swift case*, 12 Wallace (*supra*).

In this case a passenger enters the usual depot, buys a usual ticket, enters into the usual contract with the carrier, gets her baggage checked as ordinary baggage in the usual way, goes into the usual cars, and asks to be carried as others are *commonly* carried.

Is there reason or law in allowing her an enormous sum in compensation for a very small portion of her baggage ?

## VI.

**The Court ought to have directed a verdict for defendant below.**

(1) For the plaintiff's fraud practiced by concealment.

(2) Because plaintiff below proved a value of $150,000 or $200,000 for $\frac{1}{150}$th part of her baggage, which surpassed every limit of the carrier's liability.

(3) (If the verdict of the jury is to be taken as allowing for only $\frac{1}{15}$th or $\frac{1}{20}$th of the whole quantity of lace claimed, then we have the enormity of a punishment of $10,000 for $\frac{1}{3000}$th part of her baggage !)

(4) Because defendant discharged its full duty in carrying baggage gratuitously for her—both in quantity and value, and as to using every care in respect to it.

There was no claim that any of defendant's employees had stolen the lace ; on the contrary, it was proved that the trunk was old, the locks had pulled out, and the glazed blue envelopes containing the laces might have slipped out in the jolting of the cars, and every care had been bestowed on all plaintiff's baggage (fol. 102).

But the court below made the mistake of ruling that the carrier was an *absolute insurer* of these wonderful laces (fol. 119).

(5) Because plaintiff, being a married woman, is not entitled to maintain this action (fol. 95).

Holmes *vs.* Broughton, 10 Wend., 75.
White *vs.* Knapp, 47 Barb., 549.
Monroe *vs.* Douglass, 5 N. Y., 447.
Savage *vs.* O'Neil, 42 Barb., 374.
Waldun *vs.* Ritchings, 9 Abb. Pr. N. S., 359.

Blanchard *vs.* Blood, 2 Barb., 352, 2 Bl. Com., 432 to 436.

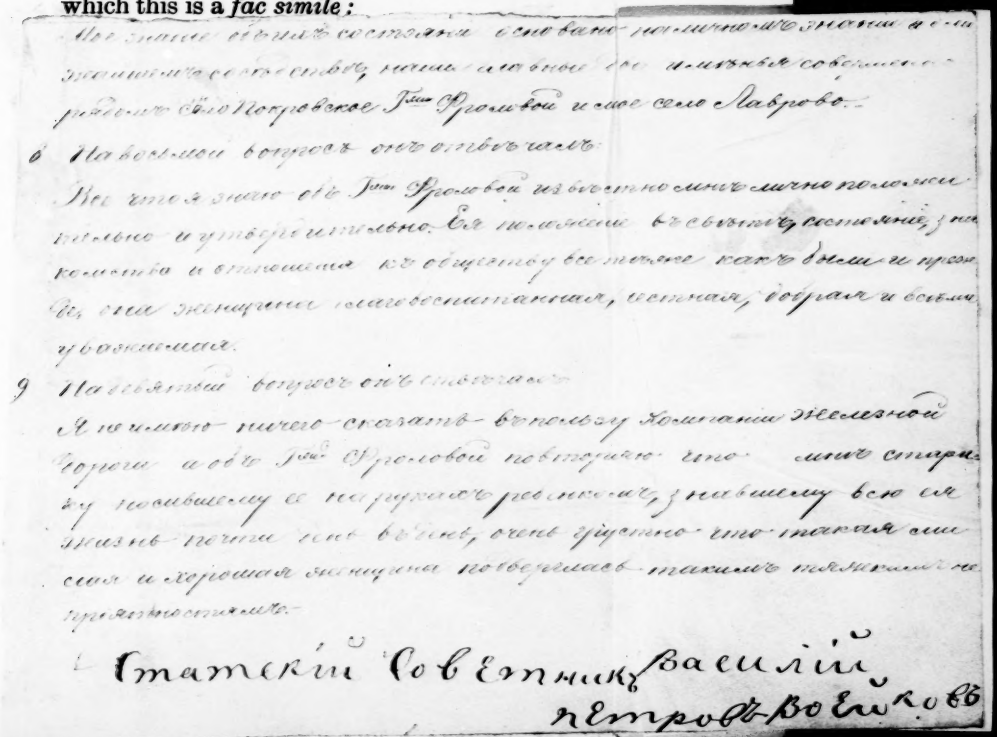
(6) For the several reasons stated at folios 92–95, when plaintiff rested.

(7) For the reasons given on the conclusion of the whole case (fol. 109).

## VII.

**The Judgment should be reversed because of the admission of improper testimony for Plaintiff below, and the improper exclusion of testimony for Defendant below.**

(1) Defendant was condemned on jargon of which this is a *fac simile:*



Under a commission for the examination of a foreign witness who cannot speak English, the deposition must nevertheless be taken in English, by means of an interpreter.

Belmore *v.* Anderson, 2 Cox Chan., case. 288.

This, and the French depositions, were excluded on the first trial by Shipman, *J.*, and if excluded the last time, there would have been no verdict against defendant.

Their admission was contrary to the Statute of New York, which provides: "All writs, process, proceedings and records in any court within this State, shall be in the English language."

3 R. S., Part III., Ch. 3, Tit. 1, § 9.
Co. Civ. Proc., § 22.

And this is made the rule for the U. S. Courts by the old act of Congress now found in R. S., § 914.

The other weighty reasons for their exclusion are stated above in the Assignment of Errors, Nos. 3, 4, 5 and 20.

A deposition was suppressed because certificate did not state it was reduced to writing in presence of the magistrate.

Bell *vs.* Morrison, 1 Peters, 356.

A deposition being in derogation of the Common Law, it is necessary to establish that all the requisites of the Statutes (U. S., Sept. 24th, 1789; N. Y. R. S., Part 3, Ch. 7, Art. 2) have been complied with, before such testimony is admissible.

Armstrong *v.* Brown, 1 Wash. C. Ct. 43.
Thorpe *v.* Simmons, 2 Cranch 195.

Where the officer did not certify that he cautioned the witness, the deposition was excluded.

Luther *v.* Hunt, 1 Newb. 4 (Dist. Mich).

The Commissioners act under a special authority,

which it is their duty to pursue, and their certificate must show they did so.

Bendeau *v.* Montgomery, 4 Wash. C. C. 186.

"No practice, however convenient, can give va-"lidity to depositions which are not taken accord-"ing to law and the rules of the Circuit Court, "unless the parties *expressly waive* the objection, "or by previous consent agree to have them taken, and made evidence."

Evans *v.* Eaton, 7 Wheat. 426.

The exceptions to the wholesale reading of a paper translation are valid.

(2) The admission of plaintiff's deposition was error, since she had wilfully carried away her six exhibits of lace, from which an intelligible idea of the value of the laces in suit could have been obtained; she swore that "the laces lost were, as to quality, price and value, in kind and the same workmanship as the patterns I produced, absolutely the same thing." (Fol. 44.)

*Non constat*, if the jury had seen them, they might have given her a verdict of $100 only, or nothing. They were offered in evidence (fol. 40), and when admitted, defendant did not except, but claimed at the trial that no evidence of value should be given until they were produced (78), after they had been admitted in evidence and marked as Exhibits E, F, G, H, I, J, respectively (40), plaintiff declared: "I will take them" (fol. 45), and "I have taken away all the laces I produced as samples." (Fol. 46.) She did this wrongful act at her peril, and as it was with the sanction of her counsel, she must be presumed to have known the legal consequences thereof.

By this wrongful act, she deprived defendant of the opportunity of giving evidence of the value of the missing laces, which were of the same "quality, price, value, kind, workman-

ship, absolutely the same thing" as the Exhibits (fol. 44). She *suppressed evidence;* so her evidence should not be allowed to stand.

In comparison with this act of deliberate spoliation by plaintiff, defendant's act was innocent—at the worst, the loss arose from the glazed blue envelopes of laces slipping out of a trunk that was broken by ordinary wear and tear on the trip, and without any design to injure on defendant's part; but she deliberately prevented all opportunity of showing the value of the laces, by forcibly carrying off exhibits admitted in evidenee, and which should have been filed with her depositions. Her depositions were thus mutilated, and, for this, as well as for the other reasons stated from fols. 25 to 28, should have been rejected.

"The omission to answer a single interrogatory "is fatal to the whole deposition."

Hurst *v.* McNeil, 1 Wash. C. C. 70.

"The refusal to answer a cross-interrogatory is "ground for rejecting the whole deposition."

Smith *v.* Griffith, 3 Hill, 333.

How much more, then, is the withholding, the carrying away *all the exhibits,* to which many of the interrogatories and cross-interrogatories relate, a ground for suppressing the whole deposition?

There were also good exceptions taken to particular questions put to plaintiff, as appears in the transcript of record.

(3) The testimony of Raff and the other experts to the value should have been excluded.

(*A*) Plaintiff might have examined experts at the time of her own depositions, in May, 1870, when they could have the six exhibits of laces as standards of value; but, instead, she waited five years, she wrongfully removed the exhibits, she deprived her own experts and the defendants, as well, of all op-

portunity to form correct estimates—she suppressed evidence, and she was therefore not entitled to put in any evidence.

This testimony was secondary, when it was fully in plaintiff's power to put in primary.

Defendant's exceptions that this testimony was incompetent covered this very ground (fol. 91); this and the other exceptions (fols. 90 to 92) were well taken.

The presumption is against a party who wilfully destroys or suppresses anything which would be admissible if called for or produced by the other party; and will justify the court in drawing the most unfavorable inference as to the nature and effect of the evidence which a party has thus been precluded from examining and using as a means for discovering the truth.

Askew *vs.* Odenheimer, 1 Bald., 380.
Jones *vs.* Murphy, 8 Watts & Sargent, 275.
Betts *vs.* Jackson, 6 Wend., 820.
Hanson *vs.* Eustace, 2 How., 653.
McReynolds *vs.* McCord, 6 Watts, 288.
Parker *vs.* Kane, 4 Wis., 1.
Hardon *vs.* Hesketh, 4 Hurlst & N., 175.
Spear *vs.* Spear, 7 Ind., 8.
Joannes *vs.* Bennett, 5 Allen, 169.
White *vs.* Lady Lincoln, 8 Vesey, 363.

A plaintiff who failed to produce a plan referred to in the specifications annexed to the contract sued on, was said to lie under an unfavorable presumption, akin to that which arises from a spoliation.

Bryant *vs.* Stillwell, 12 Harris, 314.

On the first trial, Judge Wm. D. Shipman ruled that plaintiff could only give testimony of the value of the poorest quality and narrowest

width of lace of the respective names; and that the testimony would put the value at not to exceed $1,000, and added: " I do not say that it would reach that sum, but I do say that it will not exceed it."

Here, this rule was totally abandoned.

Judge Shipman also correctly laid down the law as follows, in respect to her not producing " in court the specimens of the laces which she referred to in her deposition, and which were marked as exhibits:"

" That she has not done so is, in judgment of law, her own fault."

(*B*) Every rule of law was violated by the testimony which plaintiff was allowed to give as to value.

(1) Not one of the experts had ever seen the laces, or any like them.

(2) None had ever bought or sold any laces like them, nor ever heard of any like most of them (fols. 85, 87).

(3) Not one of them could say that they meant the same kinds of laces, by the respective names, that plaintiff meant (fol. 86).

(4) To the imaginary laces which they valued, they gave names different from those of plaintiff.

(5) In trying to value plaintiff's laces, they did not consider the fact that they were 200 or 250 years old (fol. 86).

(6) They estimated the vast and wide imaginary laces of their own minds, by multiplication of values of narrow 2½-inch lace.

(7) There was not the slightest pretense that the figures announced through this hidden mental process were market values; on the contrary, A. T. Stewart doubted whether such laces would have *any value* in this country (fol. 107).

(8) Since the plaintiff claims damages for a thing of which she can neither show the original cost, nor the present cost to make, nor the price in any market of the world, according to the rules of law, her case must fail for lack of testimony.

The place of solid legal testimony cannot be taken by figments of the brain, which a witness is first asked to conjure up, and then to value.

Such a valuation would not be of an article *in esse*, but only of the article in the witness's imagination.

Yet, on this flimsy, illegal evidence, the defendant is sought to be punished in as large a sum as is earned in a twelvemonth by the highest judicial talent of the country; in a larger sum than most men acquire in a lifetime.

(9) The motion to strike out all this so-called expert testimony should have been granted for these and the reasons stated at fols. 90, 91.

(4) Testimony as to the high birth and great riches of plaintiff below should have been excluded.

In a republican country, such pretensions can furnish no legal basis for a recovery, but they evidently inflamed the jury to defendant's prejudice, especially as the Court refused defendant's seventeenth "request to charge" (fol. 127).

No lady had ever before been known to travel with such laces in America, and the carrier could not be presumed to know that she would offer herself for transportation with her priceless cobwebs, 267 yards long and 30 inches wide.

(5) Testimony offered by defendant below should have been admitted, to show its custom and courtesy in carrying baggage, its method of protecting itself in exceptional cases like the present (fols. 75, 76), the insignificant space which these laces occupied (fol. 101), the greater bulk of gold and greenbacks (fol. 106), the sale of coupon tickets good beyond the State (fol. 105), the character and mental unsoundness of plaintiff (fols. 97, 99), the average value of baggage (103), the good character and reputation of Swallow, defendant's baggage-master in charge of this trunk (102).

The jury might infer from this last exclusion of defendant's offered testimony that they would be justified in finding that the baggage-master deliberately stole these laces, which prejudiced defendant.

## VIII.

**There were Errors in the Charge, and in Refusing to Charge as Requested by Defendant below.**

See Assignments of Error, Nos. 22 and 23.

It was certainly error to refuse to charge the 4th, 12th, 13th, 15th, 21st, and 29th requests—and in the charge to change the word "ordinary" to "reasonable" as applied to baggage. This left the question to be determined by speculation, to which there can be no assigned limits, instead of fact, which would positively prove what was ordinary. It in effect told the jury, "if you find that the plaintiff had any reasons for taking this lace with her, you may find it baggage for which defendant is liable."

The 7th exception to the charge that defendant was insurer of this lace (fol. 121) is certainly good.

A passenger, by declaring the value of his baggage, and paying separate compensation for its transportation, can make it freight, and thereby hold a carrier as insurer, but not otherwise.

Sloman *vs.* Great Western Railroad, 67 N. Y., 208.

The 11th exception to the charge is good: as plaintiff did not take only a portion of this lace along, but the whole of it. The whole of it was the inducement to the theft (if any). Defendant was just as much bound to protect the whole as any of it; and the evidence was that defendant did carry and safely deliver plaintiff a large amount of laces, which discharged all its duty.

In the "Ionic," *supra*, the presence of the articles of great value prevented recovery for any.

So too in Bell *vs.* Drew, 4 E. D. Smith, 59.

Defendant had the right to have left to the jury the question whether it had not delivered plaintiff at Niagara Falls all the laces it received from her at Albany, and took its 14th exception to the charge, and its 1st exception to refusal to charge as requested, because deprived of this right.

The jury thought they might pass upon the question of fraud, but the Court took that away from them, and without deciding it himself. Defendant there got in a good exception (fol. 122), and repeated it in the exception to the Court's refusal to charge its 8th, 9th, 10th, 11th, 20th and 31st requests.

Magnin *vs.* Dinsmore, 62 N. Y., 35.

As: "All the books agree if the negligence of "the passenger conduces to the loss of the goods, "the carrier is not responsible."

Nelson, *Ch. J.*, in Tower *vs.* Utica R. R. Co., 7 Hill, 49.

So the Court ought to have granted defendant's 24th, 32d, 37th requests, and submitted the question of plaintiff's imprudence and negligence to the jury.

The refusal to charge the 36th request was palpable error; it was necessary to prove defendant negligent, or no action could lie.

Defendant's 42d request ought to have been granted; if value could not be fixed, the verdict should have been nominal. This refusal virtually instructed the jury to find a large verdict for plaintiff.

The 33d request ought to have been charged.

The credibility of plaintiff as a witness was erroneously refused to be left to the jury by denying the 38th request to charge.

The other assignments of error embraced in the divisions thereof above numbered 22 and 23, are good respectively.

## IX.

**The Judgment should be reversed, with instructions to the Court below to dismiss the bill with costs.**

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March, 1879.